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THE PROVINCE OF JURISPRUDENCE REDETERMINED[1]

I. The Austinian Revelation

THE English-speaking world has moved uneasily into its second century of the teaching of jurisprudence. Within the ranks of those who have known the subject to be worthy of study, great progress has been made. The field opened up by Anglo-American legal scholarship is impressive. It is impressive even when compared with that of Continental Europe, though with one exception Anglo-American initiative has operated from the rear of the advancing juristic forces. Analytical jurisprudence is of course the notable exception.[2] A movement which monopolised the field of English jurisprudence for a half-century after Austin scarcely came to self-awareness in Germany until the work of Binding in 1872,[3] in France until the work of Roguin in 1889,[4] and on the Continent

[1] Being the Introduction to a projected textbook on jurisprudence (First Part).

[2] Even this might be challenged if the achievements of the glossators and commentators and the learning following Savigny's *System des Heutigen Roemischen Rechts*, 1840–1849, be given their due weight. The German influences on Austin himself (see Schwarz, "Austin and the German Jurisprudence of his Time," *Politica*, 1934, and the list of Austin's books, in Austin, *Lectures on Jurisprudence*, 3 ed., ix–xiii, and the heavy reliance of the English analysts at the end of the century on German scholarship confirmed this comment. See Markby, *Elements of Law*, 5 ed., 1896, 155; Holland, *Jurisprudence*, Preface to first edition, 1880 (for heavy reliance on the *Pandekten*). The writer does not suggest that in many of its features analytical jurisprudence is not to be traced much further back. See for many suggestions and bibliography on this point: Isaacs, "The Schools of Jurisprudence," 31 *Harv. L. Rev.*, 373, esp. 396–400 (1917); Pound, "The Scope and Purpose of Sociological Jurisprudence," 24 *Harv. L. Rev.*, 591, 594–98 (1911); Berolzheimer, *World's Legal Philosophies*. The present paper is dealing with identifiable trends of the nineteenth and twentieth centuries.

[3] *Die Normen und ihre Uebertretung*, Vol. I, 1872, Vol. II, 1877.

[4] *Le Régle de Droit*, 1889.

generally until the work of Kelsen and his school beginning the second decade of the present century.[5]

Clearly the Anglo-American contribution has been pre-eminently in the analytical field. This may, in part, explain the English lawyer's belief that analytical jurisprudence is "The Jurisprudence" as clearly and indubitably as Aristotle was "The Philosopher" for the medievals. For the purpose of training practitioners, at any rate, jurisprudence is still an approximation to Holland's "formal science of positive law." It consists more or less exclusively of the definition of legal concepts and precepts with a view to ascertaining the logical relations between them, and to arranging them in an orderly system or systems.[6]

This stranglehold of the logical science of legal relations is not to be explained solely by its profitability, or by the enthusiasm of its devotees.[7]

[5] See Kelsen, *Hauptprobleme der Staatsrechtlsehre*, 1911. For selected bibliography see Lauterpacht, "Kelsen's Pure Science of Law," in *Modern Theories of Law* (1933), p. 104, and for a selection of the Anglo-American commentaries on Kelsen's theory see Kelsen, "The Pure Theory of Law and Analytical Jurisprudence" in 55 *Harv. L. Rev.*, 44n. (1942). The most recent and perhaps fullest survey of the whole school is Ebenstein, *Die Rechtsphilosophische Schule der Reinen Rechtslehre*, 1938. Nevertheless, it is of some significance that these analytical trends on the Continent appeared quite independently of the English analytical school. For instance, both Roguin and Kelsen underwent in their turn the ordeal of discovering somewhat belatedly that John Austin's work might have some relevance for systems they had enunciated as novel. See the somewhat amusing apologia for oversight in Roguin, *La Science Juridique Pure*, 3 vols., 1923, Vol. I, p. 65n. On Kelsen and Austin see Ehrlich, *Fundamental Principles of the Sociology of Law*, transl. Moll, 1936, 484, Stone, "Book Review," 47 *Harv. L. Rev.* 719, 725 (1934), and Kelsen, *The Pure Theory of Law and Analytical Jurisprudence, cit. supra*, p. 44. In the latter article (at p. 54) Kelsen tells us that "while the pure theory of law arose independently of Austin's famous *Lectures on General Jurisprudence* it corresponds in important points with Austin's doctrine. It is submitted that where they differ the pure theory of law has carried out the method of analytical jurisprudence more consistently than Austin and his followers have continued in doing."

[6] We are not here concerned with the different though related question of the place of logic in legal thought generally. The use of syllogistic logic in law and even the building of a jurisprudence of conceptions may proceed without any attempt to render the entire system entirely self-consistent. Analytical jurisprudence, as above defined, involves essentially such a postulate of self-consistency, either in the whole body of the law or in some substantial parts of it. At the same time, Professor Dewey's point that "As a matter of fact, men do not begin thinking with premises. . . . Premises only gradually emerge from the total situation. . . . The problem is to find statements of general principle and of particular fact, which are worthy to serve as premises" is applicable *a fortiori* as an objection to any exclusivist claims of analytical jurisprudence. "Logical systemisation with a view to the utmost generality and consistency of propositions is indispensable, but is not ultimate. It is a means of improving, facilitating, clarifying the inquiry that leads up to concrete decisions. . . ." Dewey, "Logical Method and Law," 10 *Cornell L.Q.* 17 ff. (1924) quoted in Hall, *Readings in Jurisprudence*, 345, 349. *Cf.* on the dominance of the analytical approach in England, J. W. Jones, "Aims and Methods of Legal Science," 47 *L.Q.R.*, 62, 62–63 (1931). Conversely, shifts of juristic interest to other approaches have produced denials that analytical jurisprudence merits the name "science." See Willard, *The Nature of Institutional Law*, p. 41 (1882); *cf.* Ehrlich, *Grundlegung der Soziologie des Rechts*, 1913, p. 384, Moll's transl. 474 ff. The present writer has felt it necessary not to encumber the subject with discussion of the merits of the various claims to the hall-mark of science.

[7] On the lack of the "enthusiasm" of the devotees of analytical jurisprudence, see Jennings, "A Plea for Utilitarianism," 2 MOD. L. R. 22 (1938), at p. 33, and of Dr. C. K. Allen, "Jurisprudence, What and Why," in *Legal Duties*, 1931, pp. 25, 27.

In part at least it is to be attributed to the social trends of its own age and of the age which preceded. It represented a systematising reaction from centuries of chaotic and fiction-ridden growth of English law assisted by only spasmodic parliamentary activity.[8] It reflected the young faith of the period in the newly democratised legislature. The analysts tacitly assumed what the Jacobins a generation before robustly voiced, namely, that the lawyers may well be kept to their logic chopping, it being for the legislature to define the purposes of the law.

It thus sprang by reaction from the preceding age. It also fitted perfectly the ideological assumptions of the nineteenth century. Bentham early stated the axiom that "every law is an evil for every law is an infraction of liberty,"[9] and this *laissez-faire* ideal, as has frequently been noticed, rationalised the early needs of an expanding industrial civilisation.[10] From the actual trends of the era it appeared that the scope of legal interference was decreasing and was destined further to decrease to the indispensable minimum of the police state.[11] By a paradox which has been posed elsewhere, the legislation of the period had for its main end the removal of legal regulation.[12] But if the purpose of legislation was to reduce law to a minimum the inquiry into the actual operation of law in society or into the theory of justice seemed of little importance. Attention to the eternal logic which underlay that minimum of legal regulation seemed a far more profitable enterprise.

II. The Present Scope of Taught Jurisprudence

It is by no means suggested that English and American scholarship has limited itself to the analytical field.[13] Such a suggestion would merit a quick rebuke from the shades of Maine, Holmes, Gray, Maitland, Vinogradoff, Pollock and Cardozo; and from the living exponents of the subject, of whom it would be invidious to compile a list.

What is asserted is that so far as the education of the lawyer is concerned, no other branch of jurisprudence has consolidated its position beside the analytical. In the undergraduate course at English Universities the scope of available textbooks points with fair accuracy to the actual ground covered; that ground is analytical jurisprudence with some subsidiary treatment of historical jurisprudence. So far as the writer is aware there are only rare instances in which the limitations thus imposed have been

[8] *Cf.* Jennings, "A Plea for Utilitarianism," 2 Mod. L. R. 22, 23 (1938). *Cf.* the similar suggestion that the later systematisation of the common law in America, relative to the modern Roman law on the Continent, is in part responsible for the long monopoly of the American jurisprudential field by analytical jurisprudence in M. R. Cohen, "The Place of Logic in the Law," 29 *Harv. L. Rev.*, 622 (1916). For some treatment of the reasons for this analytical backwardness, see Kocourek, *N.S.* 11 *N.Y. Univ. Law. Qu. Rev.*, 319 (1934), quoted in Hall, *Readings on Jurisprudence*, 1938, 615, 621–622.

[9] Bentham, *Theory of Legislation*, 5th ed., p. 48.

[10] See Stone, *Law in the Modern State*, 1939.

[11] See, e.g. the prophecy to this effect in Miller, *Philosophy of Law*, 1884, 72–73.

[12] See Dicey, *Relation between Law and Public Opinion in the Nineteenth Century*, 2nd ed. (1914), 190–205; Stone, *Law in the Modern State*, 1939, 5–6 (*Inaugural Lecture*, Auckland University College).

[13] But see Oliphant and Hewitt, "Introduction to Rueff," *From the Physical to the Social Sciences*, 1929, xxvii, xxviii, where even this is suggested.

effectively transcended.[14] These limitations are not an accidental result of textbooks penned in another generation.[15] In 1930 an outstanding younger English teacher, Professor Keeton, published a new volume entitled *Elementary Principles of Jurisprudence*, in which he devoted six pages, no more and no less, to the evolution of law in relation to society and the state, and seven pages to "the modern state."[16] As late as 1934 the late Sir Edward Jenks, the doyen of English law teachers, published *The New Jurisprudence*, which again did little to revolutionise the field of taught jurisprudence.

In the United States jurisprudence has not yet become an established subject in the curriculum for the LL.B. degree; indeed it is not offered as a subject at all in nearly three-quarters of the recognised Law Schools.[17] The work of Roscoe Pound has long given a predominant influence to the Harvard Law School in the field of jurisprudence; the graduate course there has perhaps been unrivalled in its scope elsewhere in the world. But even there jurisprudence was not, until 1934, even a permissible subject for the LL.B. degree. Even to-day it is not a required subject.[18] Although therefore the analysis which follows is primarily directed to the

[14] Notable exceptions within the writer's own knowledge have been Dr. C. K. Allen's and Mr. W. J. Jones's lectures at Oxford.

[15] Though the cumulative effect of such books as those of Markby, Holland, Sheldon Amos, Clark and Salmond are not easily shaken off.

[16] Even these mainly of a somewhat anachronistic character.

[17] Out of the eighty schools recognised by the Association of American Law Schools in 1934, only twenty-two, including several Catholic schools, offered any course named or equivalent to "Jurisprudence." See *Directory of Association of American Law Schools*, 1934.

[18] See S. P. Simpson, "The New Curriculum," 51 *Harv. L. Rev.* 965, 982n. (1938). Nor is it required so far as I know at any other American school, though its importance is stressed at several. Thus at the University of Chicago, despite curricular requirements intended to stress the economic and social problems affecting the future of law, and despite the introduction of a course on "the sociology of law," the whole subject is optional (*University Announcement*, 1942–43, 379, 403). Again at Yale, where the curriculum has similarly been the subject of bold experiment, and includes not only a half-year's orthodox course on jurisprudence, but also courses on the anthropological and sociological approaches to social control through law, and "crime and culture," none of these are required (*Bulletin*, School of Law, 1940–41, 20–22). So at Northwestern University, where, as perhaps might be expected, under Professor Kocourek's guidance, the emphasis would appear to be on analytical jurisprudence (*University Announcement*, 1939–40); and at Louisiana State University, where Professor Hall defines his subject in terms of Professor Pound's definition at Harvard (*University Announcement*, 1939). So at the University of Michigan, where one half course is devoted to (*semble*) analytical and another to (*semble*) sociological jurisprudence (*University General Register*, 1941, 27). At Pennsylvania there is merely an optional subject of Methods of Legal Thinking and Analysis (*University General Announcement*, 1941); and at the University of California there was in 1937 an optional course the prescription of which was non-committal as to its contents save that its textbook was apparently Vinogradoff, *Common Sense in Law, sed qu.* (*Bulletin, School of Jurisprudence*, 1936–37, 22–23). The above list is intended to be representative and not exhaustive. The scope of the course available to students may also be affected by other factors, such as for instance the integration of legal and non-legal studies as projected at Harvard (Simpson, *op. cit.* at 972–973), and actually operating in another form at Chicago, or the conduct of seminars jointly by legal and non-legal instructors, or similar devices. (See e.g. the Seminar on "legal history in relation to economic and intellectual history" at the Harvard Law School in 1942; *Announcement*, 1942, and the course on the development of legal institutions at Columbia.)

limited nature of the jurisprudence course in most British countries,[19] its conclusions would apply *a fortiori* where it does not figure at all in the regular degree course, and to a less extent where it is not a required subject.

A. Historical Jurisprudence

Historical jurisprudence staked its claim to a place in the Anglo-American legal curriculum with the work of Sir Henry Maine and *The Common Law* of Mr. Justice Holmes. It owes its undoubted respectability to-day to such varied but uniformly distinguished exponents as Maine, Maitland, Holmes, and Vinogradoff, and to the seal which their scholarship placed on the more advanced German learning of the same type.

Yet even historical jurisprudence, based as it is upon a mass of profound scholarship, has remained among the lesser doctrines so far as English law teaching is concerned. Until the publication of Vinogradoff's *Historical Jurisprudence* in 1920 it was regarded above all as a means of correcting the excesses and the more obvious deficiencies of Austin's imperative theory.[20] And this has largely continued to be the case, although Dr. C. K. Allen's textbook on the modes of legal growth[21] has done much to give the historical branch an organic place in the teaching of jurisprudence.[22]

Saleilles at the turn of the century had noted the bankruptcy of the historical school on the Continent.[23] In his words—

> To note after all is not to create: the one is the effect of history, the other is that of the social sciences, and all social politics which derive from them. History in its application to the social sciences must become a creative force. The historical school had stopped half way.

In 1933 an English scholar felt able to write this epitaph upon English historical jurisprudence[24]—

> With the one great exception of Vinogradoff we lawyers have remained cloistered in our narrow walls, treading complacently the

[19] A "jurisprudence" course for the LL.B. degree is compulsory at all British Universities known to me. But there are very wide variations in scope. So far as written prescription goes the course at the University of Toronto must be unique. It covered in 1938: "Theories of law and legislation; law reform and problems of comparative law; legal principles considered in the light of analysis, history, philosophy, and the social ends to be served"; and authors recommended included Stammler, Dakin, Duguit, Geny, M. R. Cohen, Pound, and Kelsen (*University Calendar*, 1937–38, 82, 161). On the other hand, at Cambridge in 1939 the prescribed course appeared still to be analytical jurisprudence tempered by a historical view of the sources of law; and the post graduate LL.B. course was even more restricted (*Student's Handbook*, 1938–39, 422, 547). Oxford gives no description of its "General Jurisprudence," but the books recommended indicate a range far less than Toronto and somewhat more than Cambridge (*Examination Statutes*, 1942, 125, 291). The London University course, entitled "Jurisprudence and Legal Theory," is divided between Legal Theory, Sources of Law, and Analytical Jurisprudence. With few other exceptions (among which the University of Melbourne may perhaps be mentioned) the pattern in British Universities approximates to that described in the text. (I exclude, for lack of personal familiarity, Indian and South African Universities.)

[20] *Cf.* Jennings, "A Plea for Utilitarianism," 2 MOD. L. R. 22, 27 (1938).

[21] Allen, *Law in the Making*, 1st ed., 1927, 2nd ed., 1930, 3rd ed., 1939.

[22] *Cf.* in the United States, Goble, *Readings on the History of Legal Institutions.*

[23] Saleilles, "L'Ecole Historique et Droit Naturel," 1 *Revue Trimestrielle de Droit Civil*, 80 (1902).

[24] W. A. Robson, "Sir Henry Maine To-day," in *Modern Theories of Law*, 1933, at p. 179.

old paths. Insofar as the call has been heard at all it has been answered by the anthropologists and the historians.

B. The Theory of Justice

The study of the purposes which men seek to achieve through law, sometimes called "the theory of justice" or more ambiguously[25] "legal philosophy," has an even more precarious foothold in the legal curriculum. This cannot be due to its later development; for it has an important continuous history from the very earliest days of western civilisation, and has been contributed to by many of the greatest minds of successive ages. And at the opening of the nineteenth century it constituted, through the teachings of the natural lawyers, a main preoccupation of both Continental and English lawyers. Blackstone through his *Commentaries* and his lectures had given it a place of honour at the common law's first elevation to the rank of Univeristy studies.

Strangely enough the decline of attention to the theory of justice in England is related precisely to the dominance of natural law thinking at the time when Bentham and Austin were preparing their systems. Both found themselves impelled to discredit natural law thinking, Bentham mainly because its intuitionism was an obstacle to his utilitarianism, Austin mainly because it was an obstacle to his analytical and imperative delimitation of positive law.[26] Bentham's main reaction to his unprofitable days at Oxford was an attack upon it vigorously expressed in his *Fragment on Government*. He never relented from that attack.[27] Austin followed in the same path.[28] So effective were their blows against natural law as a theory of justice through law that the theory of justice itself was stricken low and so far as English law teaching is concerned has not to this day fully recovered.[29]

Many have pointed out that Bentham did not understand the creative role of natural law during its dominant period in seventeenth and eighteenth century Europe;[30] that that role depended on substantial agreement as to the criteria of good law; and that the fictitious assumption of a higher law was functionally as little of the essence of natural law as a seal is functionally of the essence of a contract by deed. It may be said, too, that Bentham, protagonist as he was of the duty to legislate, and of utility as the criterion of good legislation, can scarcely have intended to oppose a study of the ends of law. A case might be made that even Austin stopped

[25] For the reason indicated, *infra* p. 108.

[26] It is of course unnecessary to point out that while Austin and Bentham aided and abetted each other in all aspects of their work, still Bentham's utilitarianism is conceptually severable from his analytical and imperative theory of law, and that Austin's analytical and imperative theory is conceptually severable from his adoption of utilitarianism. Historical severability is a different matter. The best account of this matter is still in Maine, *Early History of Institutions*, Lecture XII and XIII.

[27] *Cf. Principles of Morals and Legislation*, first published 1780, 1879 ed., p. 17, n. 1; *Theory of Legislation*, first published 1802, transl. Atkinson, 1914, 9–12.

[28] *Lectures*, 3rd ed., Lect. IV, V, esp. 145–157, 179–180.

[29] Even Salmond in *Jurisprudence*, 8th ed., pp. 39–54, 139–145, deals with the theory of justice in a purely formal manner.

[30] Nor was Austin any clearer. Thus at one point (2 *Lectures*, 3rd ed., 112 on.) he identifies Blackstone's use of the concept with his own conception of the analytical study of positive law. At another point he defines it as "the human rules, legal and moral, which have obtained at all times and obtained at all places."

far short of condemning inquiries into the science of legislation; that indeed, like his teacher, he attributed great importance to it.[31]

History, however, is made more by the effects of words and acts than by the intention of speaker or actor. Bentham's scorn of the "unknown legislator"[32] produced inhibitions against inquiries into goodness or badness of law which are still with us. Austin's insistence that law is "positive" or not, and that if not it is unworthy of the lawyer's attention, embedded in English legal theory the conviction that law in the stage of becoming is not the affair of the lawyer.[33]

Whatever the merits of this rationalisation, the result is clear. The theory of justice has never resumed its important place in English law teaching. The most that is usually vouchsafed to students has been a glimpse of the hedonistic utilitarianism of Bentham himself supplemented by reference to Ihering's social utilitarianism. Moreover, insofar as the theory of justice has been taught at all it has been presented as a body of ideas beyond the proper scrutiny of the discreet lawyer, rather than as a necessary part of his equipment.[34] This position is a logical corollary of a dominant Austinianism; it is also a practical corollary. For the mere labour involved in an intelligent study of Austin's system tends in itself to exclude all other inquiries.

It has already been suggested that this long hegemony of Austinianism is in part to be explained by general characteristics of nineteenth century society. Anglo-Saxon conservatism, and the particularity of thought fostered by the case method, no doubt played some part. But the relative smoothness of English social and economic development, and widespread faith and contentment in contemporary tendencies was its substantial

[31] Thus he says (1 *Lectures*, Campbell's ed., p. 9, p. 85): "Now though the science of legislation (or of positive law as it ought to be) is not the science of jurisprudence (or of positive law as it is), still the sciences are connected by numerous and indissoluble ties. Since, then, the nature of the index to the tacit commands of the Deity is an all-important object of the science of legislation, it is a fit and important object of the kindred science of jurisprudence." He consequently devotes the greater part of three lectures (almost seventy pages) to a demonstration of the principle of utility (*Lectures* II, III and IV). And indeed, at one point (2 *Lectures*, 1124) he suggested that law students should "bend their attention to General Jurisprudence, Legislation, and all other sciences related to these which tend more directly to fit them for their profession or for practical politics." Further, at p. 1123 he refers without repugnance to "analogical inferences with reference to the considerations of expediency on which (the law) is built." Austin has been censured in high quarters for this lapse: see Pollock, "The Methods of Jurisprudence" (1884), in *Oxford Lectures*, 1880, p. 17.

[32] *Theory of Legislation*, trans. Hildreth, 5th ed., 1887, 102.

[33] "The science of jurisprudence . . . is concerned with positive law or with laws strictly so called, as considered without regard to their goodness or badness" (1 *Lectures*, 3rd ed., 176–177). This embedded conviction is seen for instance in Holland's approach, *infra* p. 16. *Cf.* E. Hearn, *Theory of Legal Duties and Rights*, London, 1882, p. 54: "The form and not the substance of law is the subject-matter of jurisprudence." Austin himself suggested the classics and logic as preliminary to jurisprudence. For the rest he commended to lawyers only "moderate acquisitions, out of the domain of the law (enough to prevent bigotry)." And of such possible acquisitions he had "the strict sciences" mainly in mind (2 Austin, *Lectures*, 1124).

[34] Dr. I. Jennings has observed that legal reform would have been greatly more advanced if Benthamite utilitarianism, with all its faults, had been seriously pursued as a theory of legislation ("A Plea for Utilitarianism," 2 MOD. L. R. 22, 35 (1938)). The responsibility, it is believed, lies rather in the future to find a substantial place in the curriculum for the theory of justice as a whole, including Bentham's hedonistic utilitarianism.

foundation. That faith and contentment began sooner and lasted longer in England than elsewhere. But even in England a growing confusion and discontent became manifest as collectivist legislation at the end of the century challenged some of the worst results of *laissez-faire*, and even the ideal itself. There was a sense of pain and urgency in Dicey's treatment of collectivism in 1914[35] which was not present when he first published his *Relation between Law and Public Opinion* in 1905.[36] From the clash between actual social trends and accepted ideas, there arose a new interest in the jurisprudence of human purposes, and a new threat to the monopoly held by analytical jurisprudence.

C. Theory of the Relation between Law and other Social Phenomena

Moreover the extension of the franchise, the growth in the range of legislative intervention and the appearance of the modern social sciences, created increasing awareness of the processes of social change. Juristic thought could scarcely go untouched by this ferment, and from Spencer onwards still another branch of jurisprudence gradually outlined itself—the study of the interaction between law and society, or "sociological" jurisprudence in all its varied forms. In time the early stirrings of "sociological," "economic" and "psychological" jurisprudence followed closely after the rise of the English historical jurisprudence of Sir Henry Maine.[37] It was in 1886 that Oliver Wendell Holmes, Jr., uncannily responsive as he always was to incipient trends of the time, declared to students at Harvard: "If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life."[38] And in 1897 he had already prophesied that "for the rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[39]

Its formulation for the English-speaking world is to be found above all in the work of Roscoe Pound—

> Legal phenomena are social phenomena. Observation and study of them as such may well bear fruit for social science in general as well as for jurisprudence in particular. Why should not the lawyer make a survey of legal systems in order to ascertain just what claims or wants or demands have pressed or are now pressing for recognition and satisfaction and how far they have been or are recognised or secured? . . . and this should be done consciously and avowedly, as befits the science of to-day without any cover of metaphysics or logic.[40]

[35] See the Introduction to the Second Edition, 1914, esp. xxi–liii, lx–lxii.

[36] It is to be remembered this was seven years after the basic approach was settled for the purpose of Dicey's lectures at Harvard in 1898.

[37] I shall later suggest that there is here more than a mere coincidence in time.

[38] *The Law as a Profession*, reprinted in 20 *Am. L. Rev.* 791, 792 (1897); Hall, *Readings in Jurisprudence*, 667.

[39] Holmes, "Path of the Law," 10 *Harv. L. Rev.* 457, 469 (1897). Modern caveats on the decisiveness of the conclusions of such other disciplines (see e.g. M. R. Cohen, *Law and the Social Order*, 1933, 191, in Hall, *Readings in Jurisprudence*, 800, 802–803) do not affect the main point.

[40] Pound, "A Theory of Social Interests," 15 *Proceedings American Sociological Society*, 1 (1921). And see his early definitive articles: "The Need for a Sociological Jurisprudence," 19 *Green Bag*, 607 (1907); "The Scope and Purpose of Sociological Jurisprudence," 24 *Harv. L. Rev.* 591 (1911), 25 *id.* 140 (1912). *Cf.* on the continent, Ehrlich, *Soziologie und Jurisprudenz*, 1903; Gnaeus Fiavius (Kantorowicz), *Der Kampf um Die Rechtswissenshaft*, 1906; Page, "Professor Ehrlich's Czernowitz Siemnar for Living Law," *Proc. Am. Law Schools*, 1914, 46.

D. Effect of these Developments upon the Teaching of Jurisprudence

The revived interest in the theory of justice and the new interest in the interaction of law and society have been manifest for two generations in Anglo-American scholarship. The literature is already notable. Yet it is remarkable that neither of them has established itself in legal education on a basis of equality with analytical jurisprudence. No modern English or American scholar has yet thought it worth while to produce a textbook dedicated to a comprehensive treatment of the teleological[41] or sociological branches of jurisprudence.[42] And though in these modern developments American scholarship is well in advance of the English, these subjects are not, even in the United States, a normal part of the legal curriculum.[43] The absence of textbooks covering adequately these branches other than the analytical, is not only evidence of the scope of what jurisprudence is taught: it is also a great impediment to closing the gap between what is taught and the best in modern scholarship. In the United States the obstacle is even greater than in England because of the difficulty of adapting the subject to the case method of teaching.[44]

[41] The field has of course been well opened up in the United States by writings such as Pound's "The End of Law as Developed in Legal Rules and Doctrines," 27 *Harv. L. Rev.*, 195; "The End of Law as Developed in Juristic Thought," 27 *id.* 605, 30 *id.* 201; "A Comparison of Ideals of Law," 47 *id.* 1; his *Philosophy of Law*, and in part his *Interpretations of Legal History*, and *passim*; M. R. Cohen, *Law and the Social Order*, 1933; F. S. Cohen, *Ethical Systems and Legal Ideals*, 1933.

[42] Translated works such as Berolzheimer, *World's Legal Philosophies*, or Ehrlich, *Fundamental Principles of the Sociology of Law*, fail, for many reasons which need not here be retailed, to fill the gap. Dr. N. S. Timasheff's *Introduction to the Sociology of Law*, 1940, though its appearance marked an important stage, faces to some extent the same difficulty, and in any case does not cover "sociological jurisprudence" in the Anglo-American sense. So also on its importance and self-limitation, Professor Gurvitch's *Sociology of Law*, 1942 Dr. C. K. Allen's *Law in the Making*, Jennings (ed.) *Modern Theories of Law*, and Mr. J. Walter Jones's *Historical Introduction to the Theory of Law*, though of limited scope, are welcome auguries for the future. *Cf.* as to this latter, Lon L. Fuller, "Book Review," 55 *Harv. L. Rev.*, 160, 163 (1942). Dr. Robson's *Law and the Growth of Civilisation* might possibly form a third exception. Its scope, however, is even more limited. Of course monographs and articles within the field are legion, many of them of epoch-making importance such as Cardozo, "Nature of the Judicial Process" (1921); Holmes, "Path of the Law," 10 *Harv. L. Rev.*, 457 (1897); Pound, "The Need for a Sociological Jurisprudence," 19 *Green Bag*, 607 (1907); Pound, "The Scope and Purpose of Sociological Jurisprudence," 24 *Harv. L. Rev.*, 591 (1911); 25 *id.* 140 (1912); Pound, *Interpretations of Legal History* (1930). Professor Pound as long ago as 1911 was at work upon a book entitled *Sociological Jurisprudence* (see Note in 24 *Harv. L. Rev.*, 591 (1911)). The delay in its appearance has been a most grave deprivation for Anglo-American jurisprudence. Although Professor Pound's constant publications in parts of the field since that date have been some compensation, the intervening generation and a half (representing numerous generations of students) has been largely lost to this side of legal education. Similarly it might be noted that there was no English or American periodical until 1938 dedicated to either the teleological or sociological approaches to law, though many such journals had long appeared from the continent and South America. Of course political, philosophical, and sociological journals offered a forum; and the MODERN LAW REVIEW was founded in 1937 to provide a forum for these approaches. But the main proposition remained true until the appearance in the United States of *The Journal of Legal and Political Sociology* in 1938.

[43] See *supra*, p. 18.

[44] The publication of such a case-book, in which the author is co-editor, has been delayed since 1937 by Acts of God and the King's enemies. Professor Jerome Hall's *Readings in Jurisprudence*, 1938, is a wholly admirable attempt to fill part of this need. The writer respectfully agrees with Dr. Friedmann's assessment of the importance of this volume. (See "Book Review," 3 MOD. L. R., 80 (1941).)

While this deficiency remains it must be expected that sociological jurisprudence and the theory of justice will make but little contribution to the training of the lawyer. Pedagogy will continue to open with courteous genuflexions to "sociological," "economic," "psychological," "philosophical" jurisprudence and the rest, and then proceed to the "real" business of logical analysis. The claims of such other branches are staked; but in terms of legal education the working of the claims has barely begun.[45]

The state of the matter is well crystallised in the late Sir John Salmond's definition of the scope of his own work, perhaps the most tolerant of the English textbooks.[46]

> The present treatise is primarily and essentially a book of analytical jurisprudence. . . . But although the essential purpose of this book is an analysis of the first principles of the actual legal system, this purpose is not pursued to the total exclusion and neglect of the ethical and historical aspects of the matter. These are treated, however, as subsidiary and are dealt with only insofar as it is thought necessary for the adequate treatment of the central subject-matter.

He concluded with an apologia for inflicting on the student even these incidental references to matters extraneous to logic.

As late as 1938 a then member of the Faculty of the London School of Economics, familiar no doubt with the pedagogical practice of the University of Cambridge, the English provincial universities, and the University of London, was impelled to say this: "The primary need is to take jurisprudence out of the Austinian rut in order that there may be a few jurists of wide enough vision to survey some part of a vast territory."[47] With that assessment the present writer's experience would on the whole agree.

[45] It is most significant that even Dr. C. K. Allen, whose work in the non-analytical field has been very prominent, was unable after a square examination of the matter to travel beyond the analytical conception. The general result of his "Jurisprudence—What and Why" (1 *Legal Duties*, 1 ff.) is as fruitless as his incidental observations are interesting. Jurisprudence is "the scientific synthesis of the essential principles of law" (19). The writer agrees with Dr. Allen's own comment that his word "essential" begs the question (20). It does so in a far graver sense, however, than that confessed. For what principles are essential also depends on the sense in which he here uses the word "law." He seems, with respect, to ignore the now indubitable distinction between law as a series of propositions giving rise to a rational science devoted to ascertaining their logical interrelations; and law as a phenomenon having its effects upon and being affected by society which can only give rise to an empirical science. This oversight is manifest throughout the essay: it vitiates the strange conclusion (26–27) that what is needed to render analytical jurisprudence adequate for our times is merely "a greater Austin, no less patient in method, no less meritorious in method, but perhaps more ingratiating in manner." *Cf.* the biting observations of Ivor Jennings, "A Plea for Utilitarianism," 2 Mod. L. R., 22, 27–29 (1938), who also points out the grave discrepancy between the best English juristic scholarship and the everyday tenets of legal education. The discrepancy within Dr. Allen's work will be startlingly seen by comparing the above-cited essay with the Introduction to the third edition (not the first) of his *Law in the Making* 1939, esp. 51–52. It is respectfully suggested that the position taken in the latter place is untenable unless Dr. Allen abandons the idea that the future of jurisprudence lies along the single track of a "greater" and more "ingratiating" Austinianism.

[46] *Jurisprudence*, 7th ed., 1924, 9.

[47] Ivor Jennings, "A Plea for Utilitarianism," 2 Mod. L. R., 22, 35 (1938). Dr. Jennings was trained at Cambridge, whence he went to the University of Leeds and then to London. A reference to Dr. Edward Jenks, *The New Jurisprudence*, first published 1933, sheds light on the assessment. That volume describes the analytical method as still "the dominant method of jurisprudence."

III. Current Divisions of the Field of Jurisprudence

In the foregoing survey of its branches a certain division of the field of jurisprudence has been assumed based roughly on the order of reception in England and America in the last century. It was adopted for convenience merely. It does not represent any generally accepted division, nor indeed does it represent the rational division later to be proposed by the present writer.

As a basis for such a rational division it is of some importance to survey briefly the main divisions advocated in the literature. Here we move from the actual achievements of teaching and research, to the freer arena of *Programmschriften*. The result, if anything, is even more disturbing. On their basis, indeed, it would not be too severe to describe jurisprudence to-day as a chaos of approaches to a chaos of topics, chaotically delimited. This chaos has tended to confuse rather than clarify the organic division of the subject; it has tended to multiply branches rather than to relate them to each other.[48]

At the risk of some distortion, the main schemes of the last half-century can be placed under either of two heads. The first covers schemes which merely list the main approaches to jurisprudence manifest in the literature of their time; they may be termed the eclectic schemes. The second covers more ambitious attempts to divide the field on some rational basis related to the problems of the age.

A. Eclectic Schemes

The classification adopted by the most distinguished living Anglo-American teacher of jurisprudence may serve to demonstrate the eclectic approach.[49] Professor Pound answers the exclusivist claims of analytical jurisprudence by taking the position that any systematic treatment of legal materials is within the scope of jurisprudence. He then distinguishes (1) the analytical branch devoted to a study of law as a body of logically interdependent precepts, (2) the historical branch, (3) the philosophical branch and (4) the sociological branch.

The first of these branches, it will later be agreed, is clearly supportable by the test of significance for juristic purposes. The second, or historical jurisprudence, can scarcely be parallel to it, since there may be an analytical historical jurisprudence, as well as a philosophical and a sociological-

Professor Jenks, it may be noted, scarcely yielded even the courteous genuflexion to "critical" and "sociological" jurisprudence. See Chapters II and III, esp. 65–67. He certainly gave little evidence in the work of having thought them worthy of study. See, for instance, at p. 139 his "demonstration" that jurisprudence is a material and not a formal science.

[48] *Cf.* the witty comment by A. H. Campbell, "A Note on the Word 'Jurisprudence,'" 56 *L.Q.R.*, 334, 339 (1942) that so far as verbal usage is concerned, Polonius would have approved "jurisprudence" as the best subject in the world "either for tragedy, comedy, history, pastoral, pastoral-comical, historical-pastoral, tragical-historical, tragical-comical-historical, scene individable, or poem unlimited. But it makes things a little difficult for the student."

[49] Pound, "The Scope and Purpose of Sociological Jurisprudence," 24 *Harv. L. Rev.*, 591, 594–610 (1911); Pound, *Outlines of Lectures on Jurisprudence*, 4 ed., 1928, 1; Pound, "Fifty Years of Jurisprudence" (1937). *Cf.* on the vague test of "systematic" Salmond, *Jurisprudence*, 7 ed., 1924, 1. *Cf.* Jenks division (*The New Jurisprudence*, 1931, Chaps. II and III) into (1) Analytical, (2) Comparative, (3) Historical, (4) Critical, and (5) Sociological, the last two in the quotation marks of distaste. *Cf.* Gray, *Nature and Sources of the Law*, 1909, Chap. VII limiting jurisprudence to the analytical but subdividing it into "Particular," "Comparative," and "General."

historical jurisprudence.[50] Vinogradoff's comment that "history cannot be contrasted with the theoretical study of law because it provides one of the essential elements of legal method," has never, so far as the writer is aware, been adequately answered.[51] Coming from a giant of the historical school itself, it cannot be ignored.

As to philosophical jurisprudence, described by Professor Pound as "a study of the philosophical bases of (the law's) institutions and doctrines; an attempt to reach its fundamental principles through philosophy," even more serious objections can, with respect, be brought. Philosophy has very many branches, including ethics, political philosophy, æsthetics and epistemology. Each of these branches may, from the jurist's point of view, be significant rather by its difference from the others, than by the tenuous similarity which unites them all under the mantle of philosophy. To group together lines of juristic thought of quite varied purport merely because they all make use of philosophical doctrine is vain and may be confusing.[52]

It is apparent that this classification proceeds on the basis of the main approaches which had emerged, historically, at the date of writing. Professor Pound does not purport to justify it by any other test. Sometimes, however, a similar eclectic approach is concealed behind a façade of a more rational organisation. This Professor Keeton in 1930[53] enumerated "Analytical Jurisprudence" dealing with the existing systems of law, "Critical Jurisprudence," dealing with the future of systems of law, and "Historical Jurisprudence," dealing with past systems. He proceeds also to mention "Particular Jurisprudence"; "General Jurisprudence," "Comparative Jurisprudence," together with "Economic Jurisprudence," leading to "Sociological Jurisprudence" and "Psychological Jurisprudence." The implication, at any rate, as to the last three, is that they are in some way parallel to the first.

Despite the hint of a temporal division this gives no clear idea of any mutual coherence between the branches referred to. Moreover, it is misleading in some particulars. The contrast between Historical and Analytical and Critical Jurisprudence is scarcely a mere matter of past, present and future tenses. There can, after all, be an analytical approach to a past system as the Commentators and the Pandectists have shown. And there may be treatment of future systems by way of prediction which is not critical: the future, as modern American thinkers have stressed has its "will be" as well as its "ought to be."[54] It must be apparent that the time criterion is not really related to the essential problems of

[50] *Cf.* A. H. Campbell, "A Note on the Word 'Jurisprudence,'" 56 *L.Q R.*, 334, 338 (1942). For examples, see Salvioli, *Storia del Diritto Italiano*, 8 ed., 1921; *cf.* Fifoot, *Background of English Law*, 1932; Pound, *The Spirit of the Common Law*, 1921; Pound, *The Formative Era of American Law*, 1938.

[51] *Historical Jurisprudence*, 1920, Vol. I, 4.

[52] *Cf.* the slightly different point made by Vinogradoff, *op. et loc. cit.*: "As for philosophy its influence is all pervading and is bound to make itself felt in the treatment of any subject: it forms as it were the atmosphere of all scientific studies."

[53] *Elementary Principles of Jurisprudence*, 1930, 4 ff. *Cf.* at a date before the rise of sociological jurisprudence Jethro Brown, *Austinian Theory of Law*, 369, which suggests the historical, comparative-historical, comparative and particular approaches.

[54] Thus while accepting the "prediction" theory of the nature of law, Professor Llewellyn insists on "the temporary divorce of the *is* and the *ought* for the purposes of study: Llewellyn, "Some Realism about Realism," in 44 *Harv. L. Rev.*, 1236, 1237 (1931). For the *locus classicus* of this "prediction" doctrine, see Holmes, "The Path of the Law," 10 *Harv. L. Rev.*, 457 (1897). But see the

jurisprudence.[55] Professor Keeton's reference to the time factor, indeed, does not improve Salmond's simple division into "Analytical," "Historical," and "Ethical," a division based like Pound's on the labels of current scholarship.[56]

B. Rational Schemes

The attempt to organise the contents of jurisprudence according to the banner under which *casualiter et per infortunam* they first rallied, was bound to fail. By rational schemes, on the other hand, are meant schemes which seek to divide the subject according to the nature of the problems which are to be addressed. These problems are not necessarily limited to those dealt with in current literature; nor do they of necessity include all that is so included.[57]

Thus, for the exclusiveness of a Holland "jurisprudence is wrongly applied to actual systems of law, or to current views of law, or to suggestions for its amendment, but is the name of a science. The science is a formal or analytical rather than a material one. It is the science of actual or positive law. It is wrongly divided into 'general' and 'particular,' or into 'philosophical' and 'historical.'"[58] This supreme confidence of the Anglo-Saxon analyst is rivalled only by the faith of his Continental counterpart, Kelsen, in the adequacy for the lawyer, of the "pure science of law."[59] Those who are not so fastidiously exclusive in their love of

comment of Hermann Kantorowicz on this doctrine as developed in later thought in "Some Rationalism about Realism," 43 *Yale L. Jo.*, 1240, 1250 (1934). While it is unnecessary here to take a position on the main issue the present writer would say that on this point the late Dr. Kantorowicz's remarks are more biting than convincing. He sees no distinction between defining law as what the courts do and defining science as what the universities teach. This, he himself admits, is a much weaker argument for common law countries than it is for the civilian. And in any case what the universities teach cannot alter the laws governing the course of inanimate physical phenomena; whereas what the courts do constitutes at least a part of the laws governing human conduct.

[55] *Cf.* the qualified use of the time factor in Kocourek, *Introduction to the Science of Law*, 1930, 1–54.

[56] Salmond, *Jurisprudence*, 7 ed., 4.

[57] Of course, the idea of a rational division is found long before, e.g., in Austin's distinction between "the science of law," and "the science of legislation" (*Lectures*, 3 ed., 1102, 1108) and Bentham's between "expository" and "censorial" jurisprudence (*Principles of Morals and Legislation*, 1879, ed., 322). So it will be found to be partly used in some of the classifications already considered, e.g., that of Professor Keeton, and of some to be later noted.

[58] Holland, *Jurisprudence*, 13 ed., 1924, 12–13. It has always puzzled the writer how the definition on p. 9 ("the formal science of those relations of mankind which are generally recognised as having legal consequences"), is to be reconciled with that on p. 13 ("the formal science of positive law"). The difficulty is the greater if "formal" is taken in its classical sense of "essential" on which see J. H. Drake, "Jurisprudence a Formal Science," 13 *Mich. L. Rev.*, 34, 36 (1914), quoted in Hall, *Readings in Jurisprudence*, 647–648.

[59] See, e.g., Kelsen, "The Pure Theory of Law," 50 *L. Q. R.*, 474 ff (1934), 51 *L.Q.R.*, 517 (1935). *Cf.* Allen, *Law in the Making*, 3 ed. (1937) 52. The Kelsenites admit, of course the propriety of sociological study of the effect, and even of the end ("the politics") of law: they do not, however, admit the activity to be of interest to the lawyer as such or as worthy of the name of jurisprudence. See *ibid*: "There is to-day hardly a social science into whose province jurisprudence feels itself unfitted to enter, even thinking, indeed, to enhance its scientific status by such conjunction with other disciplines. The real science of law, of course, is lost in such a process." See, however, Timasheff, "What is Sociology of Law," 43 *Am. Jo. of Sociology*, 225, 230 (1937) on the alleged "conversion" of Kelsen at the Congress of the "Institut International de Philosophie de Droit et de Sociologie Juridique, Annuaire de l'Institut," 1935, 60 ff., 81–82.

form and purity are left with the problems of substance. How can we render coherent the various approaches to legal theory produced by the problems of the modern age?

Most schemes under this head, however, have tended to be inclusive rather than exclusive. In a pioneering paper written in 1882, the late Sir Frederick Pollock distinguished the historical, comparative, analytical and practical methods applied to present law, and the "theory of legislation" and "ethical jurisprudence" applied to future law.[60]

Professor Kocourek as late as 1930 also uses a mixture of the temporal and rational criteria. He co-ordinates Legal History and Historical Jurisprudence with past time, Positive Law and Formal Jurisprudence with present time, and Proposed Legislation and Constructive Jurisprudence with future time.[61] Many of the objections to Professor Keeton's analysis apply there also. Professor Kocourek does, however, recognise a structural division cutting across the temporal one and quite independent of it.[62]

To this structural cross-division further objections may be taken. Professor Kocourek understands by Constructive Jurisprudence something very different from Professor Keeton's Critical Jurisprudence. By the former term Professor Kocourek intended to refer to a branch of jurisprudence which is concerned with "(i) the engineering problem of calculating the social effects of a proposed rule; (ii) the technical problem of stating the legislative proposal in such a way as will equate with the object sought without disturbing other parts of the legal structure."[63] It is indeed difficult to see, on this basis, why "constructive" jurisprudence is more nearly tied with the future than with the present. For its first branch involves the techniques of sociological jurisprudence, and its second those of analytical jurisprudence.

Alongside Historical, Formal and Constructive Jurisprudence, but outside the time *schema*, Professor Kocourek placed Philosophy of Law. His account of its scope is not altogether consistent. At moments he seems to say that philosophy of law is devoted to the theory of justice,[64] especially at the point of legislation;[65] it would then correspond to what I shall later call teleological jurisprudence, or what Bentham called censorial jurisprudence. However, it is by no means clear that he does not include as well any branch of philosophy whatsoever, which has significance for the law.[66] If the latter be the case a further remark later to be made would be applicable.[67]

The full implications of rational classification, however, are best seen in the schemes of Hohfeld and Professor Wigmore. Hohfeld as long ago as 1914 suggested the following divisions: (1) Historical or *genetic*; (2) Comparative or *eclectic*; (3) Formal or *analytical*; (4) Critical or *teleological*; (5) Legislative or *constructive*; and (5) Dynamic or *functional*.[68] There still

[60] "The Methods of Jurisprudence" (1882), in *Oxford Lectures*, 1890, 24. By "practical," however, he understood merely the study of law in the practitioner's sense.

[61] See the diagram on 53.

[62] *Introduction to the Science of Law*, 1930, 15.

[63] Pp. 39, 43.

[64] P. 46.

[65] P. 49.

[66] See, e.g., the reference to the unitary and pluralistic schools on p. 51.

[67] See further, below (second part).

[68] *Fundamental Legal Conceptions*, 1923, 338–363.

remained here a fundamental lack of unity in the criterion determining the divisions. Some of them, such as "Legislative" being determined by the practical result sought, some such as "Formal" by the method employed, namely, logic, some such as "Comparative" by the nature of the materials used. As has been wittily remarked: "A man in a restaurant once ordered cherry pie, mince pie, peach pie and lemon pie." The waiter quietly asked: "What's wrong with the apple pie?"[69] Furthermore, the category "historical" is open to the doubts above indicated: and analogous doubts would affect the "comparative" and "dynamic" categories.

An even more extreme example of this search for a rational division is to be seen in Dean Wigmore's stimulating design[70] in which he breaks with current terminology as well as with current thought. He would divide nomology (the science of law as a whole) into nomoscopy, nomosophy and nomopractics.[71] Nomoscopy is to ascertain the facts of legal science, whether present facts (nomostatics), past facts (nomogenetics) or concurrent facts of other science (nomophysics). Nomosophy is to test legal rules either by logic (nomocritics), by ethics (nomothetics) or by economics (nomopoeitics). Finally, nomopractics is to deal with the making and enforcing of legal rules, either by courts (nomodikastics), by legislature (nomopoeitics) or by execution (nomodrastics).

The small influence of this distinguished lawyer's scheme upon the history of jurisprudence will not surprise anyone who remembers the fate of most of Jeremy Bentham's verbal inventions. Embedded in this scheme, however, is a most valuable conception. Nomosophy, which deals with the justification of legal rules, is to test them by logic, by ethics and by economics. If ethics were to include its cognate discipline of political philosophy, and if economics had included all the social sciences, this very head of Nomosophy might have provided a simple and useful division of the whole of jurisprudence. To this we shall shortly return.

Professor Morris R. Cohen, one of the few distinguished philosophers who have addressed themselves to this problem proposed, in 1933, a return to a more simple scheme.[72] Positing that law can be viewed as setting up rules which command obedience and control conduct, he continued—

> What sort of science of such norms is possible? There are at least three approaches to such a science, which we may characterise as legal history, legal sociology and normative (or teleological) jurisprudence.

The importance of distinguishing legal history from jurisprudence of any sort has been fully canvassed in the literature, and has been mentioned above. It is difficult, with respect, to understand how the learned writer could appear to overlook it. It is equally difficult to understand the omission of any reference to analytical jurisprudence. The other two branches suggested, however, march along with Dean Wigmore's division of Nomosophy, and with part of the division hereafter to be proposed.

Dr. N. S. Timasheff in a late work[73] makes a number of interesting

[69] Isaacs, "The Schools of Jurisprudence," 31 *Harv. L. Rev.*, 373, 374 (1917).
[70] See Wigmore, *Problems of Law*, quoted Kocourek, *op. cit. supra*, n. 62.
[71] I exclude, for simplicity's sake, Nomodidactics, dealing with the teaching of the facts of legal science.
[72] *Law and the Social Order*, 1933, 240, in Hall, *Readings in Jurisprudence*, 805.
[73] *Introduction to the Sociology of Law*, 1939 (*Harvard Sociological Studies*, Vol. III), Chap 2.

refinements. He apparently recognises the analytical, historical and comparative branches of jurisprudence.[74] Side by side with Jurisprudence, which he characterises as "idiographic," he would place two other disciplines. One the learned author terms "the Sociology of Law," which is the subject of his work. This he is at great pains to distinguish from "Sociological Jurisprudence." The stated difference is that "sociological jurisprudence" is concerned to examine how human behaviour conforms to the rules of law, and how far the law is transformed by human behaviour. Whereas "the sociology of law" is a "nomographic" science, devoted to framing the "laws of a scientific nature concerning society in its relation to law,"[75] and "its content depends only to a small extent on the changes in concrete regulations. It is related to Jurisprudence (above defined) as biology is related to botany and zoology. Whereas, therefore, the writer regards "sociology of law" as a separate science, he would regard the "sociological jurisprudence" as he defines it, as merely "a functional approach to the above three branches of jurisprudence." He even denies that it is entitled to rank as a separate fourth branch of jurisprudence.

Dr. Timasheff's third discipline he calls "philosophy of law," the scope of which is "the integration of legal phenomena into an entity assumed to be known," the structure of the entity not being verifiable by scientific methods. It includes notably but not exclusively the evaluation of ultimate ends to be attained by law.

This is not the place to discuss the philosophical basis of the learned writer's distinction. A case will later be made for the abandonment of the omnibus category of "philosophy of law."[76] So also the view is taken by the present writer that the categories "historical jurisprudence" and "comparative jurisprudence" should be abandoned.[77] It is impossible to assess Dr. Timasheff's reasons for preserving them, for he offers none.[78] As for his suggestion[79] that "sociological jurisprudence" in this sense is merely "the functional method" applied to "analytical jurisprudence," it seems best to await his novel account of analytical jurisprudence which will make possible so highly skilled an operation.[80] The distinction between "sociological jurisprudence" and "sociology of law" will be considered shortly.[81]

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(*To be continued*)

[74] P. 28, n. 7.
[75] *Ibid.*, 19.
[76] *Infra*, p. 30.
[77] *Supra*, p. 108.
[78] In his article "What is the Sociology of Law," 43 *Am. J. of Soc.*, 225, 226 (1937), the learned writer does purport to give indications of the scope of these branches. There he reduces the branches to two, the "analytical" and "historical," relegating comparative jurisprudence, as the present writer does, to analysis, etc., applied to several systems.
[79] P. 28, n. 7.
[80] It certainly is impossible on the orthodox definition of analytical jurisprudence which he adopted two years ago ("What is Sociology of Law," 43 *Am. J. of Sociology*, 225, 226 (1937)). See *ibid*, 230, where even he seems to admit that it is impossible. I have not been able to reconcile these various assertions. His suggested "theoretical" jurisprudence (*ibid.*, at 226) is presumably Austin's "general" jurisprudence, *sub specie obscuritatis*.
[81] *Infra* (see second part of this article).

THE DEFINITION OF INVENTION IN PATENT LAW

I

PATENT actions are usually long and costly.[1] The law is recondite: the facts are highly technical and often obscure. Copious expert evidence is called to explain abstruse scientific matters to a non-technical judge. The complexity is increased by the almost inevitable attack on the validity of the patent for "lack of invention."

The following discussion deals with the definition of invention and contains a suggestion for reducing the degree of uncertainty in deciding this subtle and intractable issue which may be regarded as the arch-problem of patent law.

II

Both copyrights and patents are monopolies, based on "intellectual property," but otherwise they are dissimilar.

The law of copyright, with majestic indifference to merit, gives protection alike to the most impassioned poetry and to the sheerest doggerel. If an author has produced something new, he is entitled to protection irrespective of its intellectual or artistic value.

The law of patents does not adopt the same principle. An inventor is entitled to a monopoly of sixteen years for "any manner of new manufacture" within the meaning of the Statute of King James, and by a long series of judicial interpretations it has become settled law that a man cannot have a valid patent for something which is merely different from existing knowledge. To the requirement of novelty (i.e. difference) there is superadded the elusive requirement of "subject-matter" or "inventive ingenuity." This is sometimes expressed by saying that a patentable invention must be novel *de jure* as well as *de facto*; Frost, *Letters Patent for Inventions*, 1912, I, p. 38; see also p. 91: "For a patentee to succeed in upholding his patent, it is necessary for him to show, not merely newness in the sense of doing a thing which has not been done before, but he must show newness in the shape of novelty by producing a thing which, it may be presumed, requires some exercise of mind that could properly be called invention."

Thus there is a distinction between (*a*) mere improvements such as could be made by the exercise of constructional ability or the expected knowledge of the hypothetical person "skilled in the art"—the technological equivalent of the "reasonable man"; and (*b*) changes which "rise to the dignity of invention." Such inventions are not obvious to the person skilled in the art and can be regarded as worthy of protection by monopoly.

In the U.S. case, *Johnson* v. *Pennsylvania*, 72 O.G., 594, we find: "The line to be marked is that which separates mere constructive ability from inventive capacity and as the lowest order of invention is something more than mechanical skill, so the highest degree of mechanical skill is something less than invention . . . the discreet judgment of a competent constructor and not the higher faculty of creation which distinguishes the inventor."

[1] See "Patent Injustice," by K. E. Shelley, K.C., *Trans. Chart. Inst. of Patent Agents*, 61 (1942–3), p. 17.

The fundamental problem of patent law is this differentiation between inventions and mere improvements. Attempts have been made to find a "yardstick" which will provide a workable definition of "invention" in this sense. It is true that extreme cases are readily distinguishable. On the one hand, there is no doubt that the first man who made stainless steel contributed an idea of high inventive merit. On the other hand, once it had been suggested to make razors and penknives of stainless steel, there was clearly no inventive merit in the further suggestion, even when put forward for the first time, to make garden hoes of stainless steel; such a proposal might be novel but would be a mere improvement obviously lacking in invention.

The difficulties arise when the novel proposal is a border-line case. There are two possible views as to their cause—

(1) There may be a real difference between inventions and mere improvements, in spite of the presence of a twilight zone in which the difference may be imperceptible. The difficulty may perhaps be due to the lack of a sufficiently delicate legal technique; or

(2) There may be a continuous gamut of improvements shading off insensibly from constructional skill to inventive ingenuity. If so, the position of the boundary line must be arbitrary, and the difficulty of finding it will be inherent so that it cannot be settled by a refinement in legal technique.

The classical resolution of this dilemma which has been adopted in British law is to say that although it may be difficult to draw a dividing line, an improvement is patentable if it is novel and useful and if there is a *scintilla* of inventive ingenuity. The point will be grasped clearly by the following extract which brings out the essential continuity between inventions and mere improvements and yet indicates acceptance of the test that a scintilla of invention is sufficient. "Nobody, however, has told me, and I do not suppose anybody ever will tell me, what is the precise characteristic or quality the presence of which distinguishes invention from a workshop improvement. Day is day, and night is night, but who shall tell where day ends or night begins . . . it is, I think, practically impossible to say there is not that scintilla of invention necessary to support the patent," *Samuel Parkes & Co., Ltd.* v. *Cocker Bros., Ltd.*, 46 R.P.C. (1929), at p. 248, per Tomlin, J., as he then was.

The following quotation from Mr. Justice Oliver Wendell Holmes provides the argument in favour of making a distinction in spite of the existence of a border-line or penumbra: "When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the lines proposed by putting cases very near it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations" (written in 1899) (*Collected Legal Papers*, 1920, p. 233).

To the natural scientist, who approaches this problem with eyes which have not been polarised by excessive respect for the legal tradition, it will be clear that the distinction between day and night can be settled legally

on an arbitrary basis, by stating a time, but that on an optical basis, there is a continuity between day and night expressed by the existence of twilight. The whole question of validity of patents depends on the adjudication of matters relating to natural science, and the scientist will at once perceive that there are likely to be insensible gradations between invention and mere improvements, in view of the general continuity of so many natural phenomena. In fact, discontinuity, which is the basis of the assumed sharp distinction between inventions and mere improvements, is on the whole exceptional in nature except in the atomic and sub-atomic fields, where *quanta* become important.

Even if the field is continuous, there is good practical cause for requiring a certain *quantum* of novelty. "One who originates novel technology has the right to obtain a patent only if the *quantum* of novelty claimed rises to inventive level. Inventive level is one of the law's standards or norms, or values. The subsumption of any given instance must depend on the exercise of human judgment, hunch, value, criticism, gut reaction," Stringham, *Outline of Patent Law*, 1937, p. 222 (see also quotations from the Russian writer, Pilenko, *op. cit.* pp. 223–225). Here, as elsewhere in his work, Stringham supports the relativist as distinct from the absolute view.

A priori, the natural scientist would be surprised to find discontinuity and would expect the existence of a continuum, since inventions are evolutionary products of research. Psychologically, the same continuity would be expected. All legal authorities agree that there is no invention when the alleged improvement is obvious to the hypothetical workman skilled in the art. This means that to be patentable, the invention must rise above the threshold value of obviousness. Now this threshold value must depend on the level of intelligence which the skilled workman is assumed, by a legal fiction, to possess. This will vary from age to age. Many chemical platitudes of to-day would have been regarded in past times as brilliant and unforeseeable predictions.[2] Analogy with the psychophysiology of sense impressions would indicate that there is nothing critical or discontinuous in the threshold value of a complex sensation such as sight or hearing. It is true that in the stimulation of a single nerve fibre, the all-or-none principle applies; there is either zero response, or above a certain stimulus, full response. There is, however, a great difference between this all-or-none protopathic response and the more refined and discriminating epicritic response of the higher nerve centres; it seems clear that the all-or-none principle does not apply to the evaluation of ideas especially when we consider that these ideas form part of a continuum. I can see no room for the all-or-none principle in forming a judgment of value (or non-value) in these cases, and yet it is on this all-or-none assumption that the prevailing theory of patentability and validity depends.

We again reach the conclusion that there can be all gradations of novelty, from something different but obvious to anyone having a minimum of practical knowledge and experience, to something which is so brilliant and remarkable that the highest genius (whatever that may be!) is required to produce it.

[2] Cf. the decision in *Badische* v. *Levinstein*, 6 R.P.C. 387, on patentability of dyes from naphthols in spite of prior publication of the homologous phenols, and the famous dictum of Professor Dewar: "There is no prevision in chemistry," with the decision that a process using higher members of a known homologous series was unpatentable, and the observation of Sargant, L.J., in *Sharpe & Dohme* v. *Boots*, 45 R.P.C., at 181, that chemistry "after all, is a science and not a mere collection of isolated phenomena."

A similar conclusion is reached by an examination of the subject from a logical point of view. There is much of the word-magic of the savage in the desperate attempt to find some unchanging and definable attribute present in all inventions and absent from all mere improvements. This is the "hypostasis" or personification of fictitious entities or universals, against which we are warned in works such as *The Meaning of Meaning* (Ogden and Richards). E. Williamson, *Trans. Chart. Inst. of Patent Agents*, Vol. 61, p. 82, in a paper on the Linguistic Basis of Patent Law, discusses the word "invention" from the point of view of Bentham, *Theory of Fictions*.

As Jerome Frank says in *Law and the Modern Mind*, p. 315: "Nominalism (the first step towards knowledge of the provisional or relative character of all concepts) has made but little headway in jurisprudence. Conceptualism may perhaps be said to have its chief modern stronghold in the law. Many lawyers are still infected with that scholasticism which converts abstractions into independent entities having an out-there character."

The confusion is made worse by an unreflective application of the traditional logic; according to the Law of Excluded Middle it is assumed that A is either B or non-B—an invention or not. The scientist will probably agree with the somewhat unconventional "dynamic logic" expounded by Bogoslovsky in *The Technique of Controversy* (International Library, pub. Kegan Paul, 1928) according to which the general formula for our thinking must be "A is B to such a degree and non-B to such a degree." On this view, A lies somewhere on a continuum of which B represents one pole and non-B the other. Thus an object is usually neither white (B) nor black (non-B) but a particular shade (A) of the continuum of grey. Definition is effected by stating the position in the continuum, e.g. 30 per cent B and 70 per cent non-B.

Bogoslovsky finds precedents in the doctrines of Heraclitus and Hegel. A similar view is expressed by a modern physicist (Jeans, *Physics and Philosophy*, 1943) who condemns "the philosophical practice of depicting the world entirely in black and white, and so ignoring all the half-tones, gradualness and vagueness which figure so prominently in our experience of the actual world. The obvious example of this is provided by the law of the excluded middle, which has dominated formal logic with devastating results, from the time of Aristotle on."

If this conclusion is accepted, the doctrine of the scintilla of invention is seen to be of little logical value. At this stage it may be asked how this metaphysical conception ever arose. I have not been able to track it down to any very early source—it is mentioned in Frost's book as a concise summary of the view of the collective trend of the cases: "The question arises as to whether any particular *quantum* of invention, in this sense, is necessary to the support of a grant of Letters Patent. The result of the cases on the point is that, provided the subject-matter of the patent is a manufacture, within the meaning of the Statute of Monopolies and new and useful, a mere scintilla of invention is sufficient" (p. 34).

The doctrine may perhaps be derived from a recollection of the famous controversy on the *scintilla juris*, regarded at one time as the *Pons Asinorum* of the law of real property. In 1595, in a case on contingent remainders, Dyer invented this shadowy abstraction to explain the *locus* of the right of seisin as it was shifting or springing at the death of one person to the next remainderman. The *scintilla juris* was a hypothetical trace or emanation of legal right or title or seisin, "a fiction invented by

perverse astuteness to escape a difficulty which itself only had created." Finally, the ghost was laid in 1860 by Lord St. Leonard's Act, which stated that the rights of the remainderman were determined without any invocation of the *scintilla juris*.[3]

I suggest that the same obscurity and artificiality applies to the scintilla of invention. A scintilla is an incipient or just perceptible spark. We must, then, ask the questions: Spark of what? Perceptible to whom?

If we say that it is a spark of invention just perceptible to the skilled workman, we are thrown back on the test of obviousness.

"The real and ultimate question is: Is the combination obvious or not?" (54 R.P.C. 40). A similar test very usually accepted to-day is that implied by the question of Viscount Dunedin in *B.T.H.* v. *Metropolitan Vickers*, 45 R.P.C., 1928, at 22: "Would a man who was grappling with Rosenberg's problem, without having seen Rosenberg's patent, and who had Tesla's specification in his hand, have said: 'That gives me what I wish'?"

We must then face the fact that obviousness involves what the German legal writers term a *Werturteil*, a judgment of value. (See Isay, *Patentgesetz*, also Müller-Liebenau in *Das Wesen der Erfindung*, 1924, p. 6, and E. Müller, *Der Patentanspruch*, 1925, p. 38.)

The judge is called upon to evaluate the *quantum* of difference from the prior art, by making a subjective estimate of its effect on the mind of the hypothetical skilled workman. There is nothing of the absolute here; the judge must make an estimate of more or less.

At this stage it is convenient to mention the position which had arisen in Germany before the war. In 1890 Robolski (*Theorie und Praxis des deutschen Patentrechtes*, p. 4) referred to a commission appointed in 1886 to examine the possibility of forming a definition of invention. No such definition was put forward either by the commission or by Robolski.

Even in 1890 Robolski adumbrated some of the difficulties discussed above; he referred to "relative conceptions" such as "substantial advance"; he asked where the region of considerable advances began, and he mentioned the *Werthbemessung*" (judgment of value) of the experienced patent office examiner.

In spite of the immense volume of legal research in Germany since that date, no really objective definition has ever been discovered.

At one time, it was considered that a patent should not be allowed for an improvement unless accompanied by some "new technical effect." Thus, if it was proposed to make the knife edges of chemical balances of stainless steel, it might be argued either that there was no new technical effect as compared with the use of stainless steel for razors since non-rusting was the chief advantage in each case, or alternatively that there was a new technical effect since the knife edge in the balance combined the hardness of steel with the non-rusting of brass and gave a new result *qua* friction. A decision of patentability would depend on the acceptance of the latter alternative. "New technical effect" is discussed in Kent's

[3] See Holdsworth, *History of English Law*, Vol. VII, p. 137; Atlay, *Lives of the Victorian Chancellors*, Vol. II, p. 4; also *Blackwood's Magazine*, Vol. 81 (1857), at p. 248: "When a man had indicated the future enjoyment of his property, in certain specified contingencies, the antique conveyancer, putting on a pair of huge magnifying glasses, fancied he detected in that man, who himself imagined that he had exhausted himself of all connection with the property, a lambent spark of interest—a mere metaphysical entity—a momentary seisin, adequate to 'feed the use.'"

Kommentar, 1906, I, 50 and 108. But the recent developments have clearly diverged from the older doctrine. In Isay, *Patentgesetz*, 1911 (second edition) (48), there is a reference to the new technical effect, but it is stated that this is superseded by the criterion of "considerable technical advance," differing from Kent, 1906, I, 115–116. In Isay, 1920 (53) the reference to the new technical effect has disappeared, and in Isay, 1926 (56) the heading "Inventive Character" has been replaced by "Inventive Level."

Another criterion of invention proposed in Germany was that of "surprise." It was considered that if the result surprised the skilled workman, invention must be present. This explains the common use of the phrase, "The surprising observation has now been made" in German patent specifications, and the cynical comment that patent agents must be very easily surprised. This test of "surprise" is discussed in a paper by E. Williamson, *Trans. Chart. Inst. of Patent Agents*, Vol. 59, p. 90. (On "Prediction and Invention," see Potts, *Journ. Soc. Chem. Ind.*, 1914.) However, Seligsohn, *Patentgesetz*, 1920, pp. 25 and 33, considered that "surprise" must be regarded as an obsolete test.

Neither of these criteria was ultimately accepted as the only test by the Reichsgericht, and the later view was that a patent should be allowed for "a considerable technical advance." There is at first sight an attractive objectivity in this criterion. Instead of psychological exploration of the mind of the hypothetical skilled workman, we are invited to make an objective appraisal of the advance actually achieved in the art, which can be tested by evidence. But in the end the apparent simplicity disappears, since we are finally thrown back on the evaluation of the amount of the advance. What is a "considerable" advance as distinct from an inconsiderable and unpatentable advance? It is necessary once again to make a judgment of value, or a subjective evaluation which now occurs in the mind of the judge, informed by technical evidence. It is once more clear that we are endeavouring to bring discontinuity into a field which is essentially continuous.

In U.S.A. a test was proposed by George L. Roberts in his book, *The Patentability of Inventions and the Interpretation of Patents*. This was discussed fully by F. W. Hacking (*Trans. Chart. Inst. of Patent Agents*, 61, 170). The test depends on the presence or absence of a "new functional relationship" between interrelated instrumentalities.

Roberts expressly disclaims any *a priori* philosophical and theoretical speculations originating in his own mind, and relies consistently on the classical rules applied to cases decided by the Supreme Court. I suggest that the "new functional relationship" cannot be an objective test, and must inevitably be open to objections raised in virtue of continuity.

In fact, the definition is an elaboration and generalisation of the old distinction between patentable combinations and unpatentable aggregations, and it may also be regarded as a variation of the German "new technical effect." The difficulty is that the word "new" will always import difficulties of interpretation and subsumption. Does "new" mean "not identical" or "substantially different"? How far is an analogous process to be regarded as depending on a new functional relationship? We are thrown back on the subjective judgment of value.

This discussion throws some light on a recent pronouncement of the National Planning Commission in U.S.A. (1943)—

"The Commission therefore recommends the enactment of a declara-

tion of policy that patentability shall be determined objectively by the nature of the contribution to the advancement of the art, and not subjectively by the nature of the process by which the invention may have been accomplished."

This statement cannot refer to the subjective process by which the invention has been *actually* accomplished by the inventor. It is well settled that the Court should not explore his mind; it is irrelevant whether the invention is the result of prolonged research or happy accident. Nor does the criterion of obviousness apply to the inventor himself; he may have been in ignorance of the published art and may have made a brilliant advance on his own prior knowledge, but after subtracting the published art his contribution may be found to be negligible. By a legal fiction, the criterion of obviousness is applied to a hypothetical person skilled in the art who is presumed to be familiar with published literature. This is a subjective test hallowed by precedent.

We must ask whether the recommendation of the Committee is desirable or not. It is seen to be in accordance with the pre-war attitude of the German Reichsgericht.

It is again suggested that the so-called objective test is in reality a subjective one since it depends on an estimate of *quantum* of advance as made in the mind of the judge. Probably the reason for this suggested definition is the desire to overcome an unfortunate dictum in the judgment of the U.S. Supreme Court in the recent *Cuno* case (*Official Gazette*, 1942, Vol. 534, p. 669) which has aroused a furore of comment from patent attorneys. (See the American *Journal of the Patent Office Society*, 1943, *passim*, available in the Library of the Patent Office at London.) In that case Mr. Justice Douglas remarked that "the new device, however useful it may be, must reveal the flash of creative genius, not merely the skill of the calling . . . strict application of that test is necessary lest in the constant demand for new appliances the heavy hand of tribute be laid on each slight technological advance in an art." It will be seen that this is only an overstatement of that familiar figment, the scintilla of invention. But it is a serious overstatement since it seems at first sight to postulate a higher standard of "invention" that has hitherto prevailed.

The general position in Great Britain, pre-war Germany and U.S.A. is that although no satisfactory objective criterion of invention is available, and although "invention" is regarded as indefinable in general, the Court proceeds "as if" invention could be defined or at least recognised in any specific case under discussion. This attitude is essentially pragmatic. It must, therefore, be judged by its success or failure in practice. Those who are familiar with its working will probably agree that the present system is vitiated by uncertainty, at any rate in the more controversial cases.

Now it is very important to decide whether this is due to our failure so far to have discovered the appropriate definition of some entity which is capable of definition by further research, or to an inherent impossibility of definition. It is one thing to define a philosopher as a blind man searching in a dark room for a black cat—more delicate instruments may enable him to succeed. It is another thing to say that the black cat is not there!

In the present case I doubt very much whether we are not groping for something which is not there. For the last thirty years I have been trying to find a satisfactory test of invention. In 1913 I developed an application to law of the mathematical theory of functionality, but this merely served to classify existing decisions. I have also explored the subject in a number

of papers from the chemical, biological, philosophical, logical and semantic approaches.[4] Psychology does not appear to provide a solution.[5] As a result I have come to the conclusion that the desired criterion of invention is an *ignis fatuus* and that constructional skill and invention are the two poles of a continuum within which there is no logical justification for making out a sharp boundary line.

In the discussion at the Chartered Institute of Patent Agents, after my 1941 paper, only one of the seventeen speakers challenged this suggestion that there is continuity between inventions and mere improvements, although the classic Anglo-American doctrine contains the implication of discontinuity (*ibid.*, p. 62).

I suggest, therefore, that the disease cannot be cured by treatment based on more refined methods of diagnosis, but that an entirely different approach is necessary.

III

We may restate our problem by saying that although there are insensible gradations between unpatentable improvements and patentable inventions, we must in practice treat them differently. The suggested solution lies in a broadening of judicial discretion in the boundary-line cases. Under the present system there are many cases where a given improvement falls clearly inside or outside the line; these cases can be decided as heretofore. But where a case falls near the border-line, within the penumbra between light and darkness, I suggest that in an infringement action the Court should have power to grant a *limited* relief, with discretion as to costs and other conditions. In other words, no injunction would be granted against infringement, but the defendant would be entitled to continue user of the patent on payment of a moderate royalty assessed by the Court to be commensurate with the contribution made to the art. The clear-cut cases would be adjudicated valid or invalid as hitherto; border-line cases would be adjudicated as having a validity *graduated* in accordance with the evidence. In effect these border-line cases would be placed under conditions similar to those obtaining in patents indorsed "licences of right," and the royalty could be made either nominal or substantial depending on the amount of novelty and utility in the case, while all the relevant factors would also receive consideration. The assessment of such a royalty is nothing new, since the Patent Office and the Court are already empowered to act in this way in cases dealing with licences of right under Section 24 or applications for compulsory licence made under Section 27 of the Patents Act. A body of experience is available from the awards to inventors made by the Royal Commission after the last war.

I propose first to deal with the theoretical justification for such a "graduation" of validity, and then to cite certain parallels to this proposal which form part of the existing law.

The verdict of graduated validity is suitable for patent cases because we are dealing with a class of phenomena lying within a continuum. Such a verdict is sharply opposed to the disjunctive verdict, aye or no, which is suitable in cases dealing with questions of pure fact. The disjunctive, or all-or-none, verdict must be given when we have to decide whether

[4] *Nature*, 1913; *Journ. Soc. Chem. Ind.*, 1914; *Transactions of Chartered Inst. of Patent Agents*, Vol. 35, p. 89; Vol. 36, p. 76; and Vol. 60 (1941–2), p. 21.
[5] See *Patents, Invention and Method*, Open Court Pub. Co.

the defendant did or did not strike the fatal blow; it is quite inequitable when we are attempting to fix the relative merit of a novel idea.

In fact, when we are deciding on patentable merit, we are doing something which is similar to the act of the examiner who is marking a paper. In the majority of examinations, the verdict is not all-or-none; it is usual to provide for different grades of merit by different classes, or by pass and honours. Even in examinations, we can distinguish between elementary mathematics papers, where the answers may be right or wrong, and papers in literature, where a judgment of value is required.

From the nature of the subject, we should expect that questions of patentability are unlikely to be suitable for the present all-or-none verdict. Yet if a litigant is just on one side of a (non-existent) border-line he may be ruined, and just on the other side he may make a fortune.

In certain other fields of law, the harshness of the disjunctive, all-or-none verdict is mollified by judicial discretion. This applies especially to maritime cases of negligence involving collisions between ships.

At one time it was suggested that the conception of negligence itself might be graduated (*culpa lata* and *culpa levis* in Roman law), but although this distinction is not accepted, the Court does have discretion in apportioning damage, i.e. x per cent to one party and $(100 - x)$ per cent to the other.

It may be argued that under the present practice it is difficult enough to distinguish between valid and invalid patents, and that the introduction of an intermediate class of graduated validity would be a further complication. This is not so: the intermediate class would be limited to the cases of genuine doubt and the consequences of assigning a case to the wrong class would not be overwhelming. Under present practice if a valid patent is declared invalid, the consequences to the plaintiff are disastrous; he automatically loses his rights and usually has to pay costs. Under the proposed practice, there would be a margin of discretion which would take into account the special circumstances of each case. Accordingly, if a valid patent were wrongly placed in the intermediate class, the plaintiff would lose his complete monopoly but would retain a partial right, namely, to a royalty assessed by the Court. If an invalid patent were wrongly placed in the intermediate class, the defendant would have to pay an equitable royalty, but would not be obliged to discontinue user of the patent. In each of the above cases, costs would be at the discretion of the Court.

The other possibility, namely, placing a valid patent in the invalid class, or vice versa, would be much less likely than under present practice, since valid and invalid patents would be separated by the zone of intermediate patents. Hence there would be much less possibility of a disastrous miscarriage of justice and, even if a mistake were made, the consequences would be mitigated so as to be much less serious than they are now.

As examples, consider the cases of *Sharpe and Dohme* v. *Boots*, 45 R.P.C. 153, and *Heap* v. *B.D.A.*, 46 R.P.C. 254. In the former the Court might have held that the broad claim was clearly invalid, but that the claim for hexyl resorcinol was sufficiently novel and useful to merit a small royalty; costs to the defendants. In the latter, the Court might have decided in its discretion that as the process was novel *de facto*, a royalty should be paid but no injunction granted; each party to pay its own costs.

Two further examples may be given, in which the actual verdict sustained validity in border-line cases where a graduated verdict would have been obviously more suitable in view of the dissenting judgments.

In *American Braided Wire Co.* v. *Thomson*, 6 R.P.C. 518, the House of Lords held the patent valid by three to two; there were expressions of doubt and hesitation in most of the judgments in the House of Lords and in the Court of Appeal.

In *British Vacuum Cleaner Co., Ltd.* v. *L. & S.W. Rly. Co.*, 29 R.P.C. 309, the House of Lords sustained the patent by four to three, affirming a decision by two to one in the Court of Appeal.

In both these cases the differences of opinion might have been largely reconciled by the graduated verdict: mitigated damages with a compulsory licence but not an injunction.

It may be argued that this proposal leaves too much to the discretion of the Court, but the reduction in the risk of injustice seems to justify it. It can hardly be seriously argued that legal certainty would be decreased, since the present system is a gamble in the border-line cases. It is probable that the proposed system would lead to settlements out of Court in those border-line cases, and in view of the crippling expense of patent actions, such settlements should be encouraged.

The argument based on "legal certainty" can be dismissed either by appealing to the man of business with his experience of "the glorious uncertainty of the law," or to Mr. Justice Jerome Frank (*Law and the Modern Mind*) with his cogent argument that legal certainty is a myth. The present system is uncertain, not because of human fallibility but because of inherent continuity; the graduated verdict expects and allows for possible uncertainty.

It must be admitted that from a theoretical point of view, the proposal deviates from the idea laid down by Mr. Justice Holmes (*loc. cit.*) that lines do exist. Moreover, the arguments in favour of the proposal are *a priori* and do not follow the traditional Anglo-American treatment, so typically illustrated by Roberts (*loc. cit.*), in which the dicta of the Courts are regarded as having almost mystical authority. However, the late Mr. Justice Cardozo (*The Growth of the Law*, p. 25) eloquently supported the case of the legal philosopher and theorist, and in dealing with these problems arising out of scientific research, a theoretical treatment is essential if any improvement of the law is to be made by legislation.

IV

Summarizing, the present proposal is that the risk of wrong decisions would be much reduced if the Court were given discretion in border-line cases to decide that the patent should be maintained, but that it should be treated as if it were indorsed "licences of right," with power to meet the facts of the case by assessing royalty, anything from a nominal to a substantial one, and by awarding or withholding costs. No fundamental change of the general law would be required and patents which were clearly invalid would be treated in accordance with existing practice. The graduated validity would apply only to the border-line cases. There are precedents for this proposal in other branches of law, and owing to the continuity of natural phenomena, the proposal seems especially suitable for dealing with patents where scientific matters form the very basis of the controversy.

The present system is almost intolerable, and the proposed change would effect a great and beneficial improvement without disturbing general principles, except that the elusive scintilla of invention would lose its present undue importance. It is difficult to see how any such comparable

improvement could be effected without much more drastic amendment of the law. The essence of the present proposal is to compensate for the continuity of the phenomena under consideration by providing the possibility of a verdict which is graduated instead of disjunctive, and this result can be achieved by allowing scope for judicial discretion in the border-line cases.

In addition to applying to border-line cases of "invention," the extension of judicial discretion might perhaps be possible in border-line cases of infringement, to avoid invoking the doctrine of equivalents, and in hard cases of invalidity by inaccuracy of some part of the specification (*Norton* v. *Jacobs*, 54 R.P.C. 271).

This suggestion must not be confused with other methods of dealing with doubtful cases. The Roman "*non liquet*" and the Scots "not proven" were not decisions but refusals to decide. The judicial "hunch" described by American writers is a refined development of the decision of Mr. Justice Bridlegoose, by throwing dice. On the contrary, "graduated validity" provides a scientific method of adjusting the decision in accordance with the merits, and thus reducing the "experimental error" in patent litigation.

HAROLD E. POTTS.

[We are glad to have an opportunity of publishing this article by a leading chartered patent agent. His suggestion that this well-known difficulty in the law of patents should be solved by granting a discretion to the Court to make partial awards in border-line cases is very much in line with the trends of modern practical jurisprudence. Two outstanding statutory examples, both of which have been the subject of discussion in the MOD. L. R., may be mentioned, viz. the Hire Purchase Act, 1938 (particularly s. 11 (4)) (see 2 MOD. L. R. 49), and the Law Reform (Frustrated Contracts) Act, 1943 (see 7 MOD. L. R. 66). Reference may also be made to the discretion conferred upon the Court under the Inheritance (Family Provision) Act, 1938, to vary the terms of wills so as to grant maintenance to the widow, infant sons, or unmarried daughters of a testator (see 6 MOD. L. R. 215).—Editor, MOD. L. R.]

CONTRACTS FOR THE BENEFIT OF THIRD PARTIES

THE recent case of *Re Schebsman* (1943),[1] and the slightly less recent cases of *Re Stapleton-Bretherton* (1941)[2] and *Butler Estates Co.* v. *Bean* (1942),[3] suggest some reflections upon the general position in English law of contracts for the benefit of third parties. The question usually discussed in the literature is the remedy of the third-party beneficiary, but in this article attention will be directed principally to the remedy of the promisee, although something will also be said on the remedy (or lack of remedy) of the beneficiary, particularly in so far as it bears on the remedy of the promisee.

It is an axiom of the common law that where A and B make a contract

[1] *Re Schebsman, ex p. Official Receiver; The Trustee* v. *Cargo Superintendents (London), Ltd.*, [1944] 1 Ch. 83, affg., [1943] Ch. 366.

[2] *Re Stapleton-Bretherton, Weld-Blundell* v. *Stapleton-Bretherton*, [1941] Ch. 482.

[3] [1942] 1 K.B. 1.

in which A promises B to confer a benefit upon C, who is no party to the contract, C cannot sue A upon the contract. This rule is now generally admitted to be unsatisfactory, and it is made worse by the fact that in many cases even B, the promisee, will have no effective means of enforcing the contract. This is because, if A, the promisor, fails to confer the promised benefit upon C, the beneficiary, B will in many cases suffer no damage and thus have (apparently) no cause of action save for nominal damages. There may thus be no effective sanction to compel A to carry out his promise.

This difficulty is illustrated by *West* v. *Houghton* (1879),[4] where the tenant under a sporting lease covenanted to keep down rabbits and failed to perform his covenant. It was held that, the damage caused by the rabbits having been suffered not by the lessor but by the agricultural tenant of the land, the lessor could recover only nominal damages from the covenantor.[5]

It is possible to imagine cases, however, where substantial damages could be recovered. Thus if the situation is that B, the promisee, owes £100 to C, and A agrees with B for value to pay this £100 to C in discharge of B's debt, B's damages in the event of breach by A will be £100.[6] C in this case is what the Americans call a creditor-beneficiary, i.e. a person whom the promisee wishes to be benefited in order that this benefit may discharge some duty owed to such person by the promisee. Again, if A agrees with B to pay £100 to C (a donee-beneficiary), in return for a consideration rendered to A by B, upon breach by A of his promise B can sue him for the return of money paid (as on a consideration that has failed), or for the value of goods supplied or services rendered (as on a *quantum valebant* or *quantum meruit*). This, however, would result only in restitution; the "expectation interest" of B and C in the performance of A's promise would not be protected. The only method of protecting the expectation interest of a donee-beneficiary (where there is no trust, etc., as noted below) is an action for specific performance by the promisee. But there are well-established limits upon the remedy of specific performance, and in any case the protection of the donee-beneficiary by this method (again speaking apart from cases of trust, etc.) involves the voluntary co-operation of the promisee.

We are now in a position to consider *Re Stapleton-Bretherton* and *Re Schebsman* (above). In both these cases the question was broadly the same. Suppose that A and B have made a contract in which A has promised for value supplied by B to pay a sum of money to a third party, C, and suppose that A is willing to perform his promise; can B nevertheless demand that the money be paid not to C but to him, B? The answer given in both cases was, on the facts of those cases, No.[7] A is entitled to perform his contract

[4] 4 C.P.D. 197. Cp. Williston, *Contracts*, revised edition, ii, Sect. 357, n. 7. At one time the courts went so far as to hold that the promisee, having suffered no damage, had no right of action at all; *Levet* v. *Hawes* (1599), Cro. Eliz. 619, 652.

[5] The case was dissented from, *obiter*, by James and Cotton, L.JJ., in *Lloyd's* v. *Harper* (1880), 16 Ch.D. at 311, and by North, J., in *Re Flavell* (1883), 25 Ch.D. at 98, on the ground that such facts would raise a trust of the covenant and therefore that full damages could be recovered (see later). Assuming that there was no trust of the covenant the decision that only nominal damages were recoverable has not been questioned.

[6] Cp. *Restatement of Contracts*, Sect. 135, Comment (*b*).

[7] An earlier case somewhat to the same effect was *Israelson* v. *Dawson*, [1933] 1 K.B. 301, *per* Greer, L.J., at p. 306, approved by Viscount Maugham in *Digby* v. *General Accident Corpn.*, [1943] A.C. at 131.

in the way specified in the contract, and the fact that the consideration has been furnished by B does not give B a right to alter the terms of the contract. In *Re Stapleton-Bretherton* the promisee had died, and in *Re Schebsman* he had become bankrupt, and the question was raised not by the promisee but by his personal representatives and trustee in bankruptcy respectively. This, of course, was immaterial to the decision.[7a] Notwithstanding some ambiguous language of Simonds, J., in *Re Stapleton-Bretherton*, it seems clear from the decision of Uthwatt, J., and the Court of Appeal in *Re Schebsman* that a contrary conclusion can be reached, as a matter of common law, only if it is possible to imply the words "or as the promisee may direct" after the promise of payment in the contract. Such an implication can be made only in accordance with the ordinary canons of construction, and it is difficult to imagine a case where it could properly be made. Another possible method of reaching a contrary conclusion, in equity, by means of the doctrine of resulting trust, will be considered later.

A highly unusual case where B was allowed to sue A for a payment that A had promised to make to C was *Cleaver* v. *Mutual Reserve Fund Association* (1892).[8] B insured his life with the A company, the policy money being payable to his wife, C. C murdered B. On these facts there was some difficulty in saying that the insurance company was liable to anyone. An action in right of the assured might seem to be open to the objection that the company had not undertaken to make any payment to him; an action by his wife might seem to be open to objection on the score of public policy.

It was held by the Court of Appeal, evading the first objection but upholding the second, that B's representatives could recover the policy money from the insurance company, but that as C's claim to it under Section 11 of the Married Women's Property Act, 1882, was barred by the doctrine of public policy, the representatives held the money in trust for those entitled to B's estate other than his wife. The happy result of this was that any children of B would benefit.

Lord Esher, M.R., held flatly that as between B and the insurance company the stipulation for payment to C would have no effect, but this seems contrary to principle. A better ground was that taken by Fry, L.J., and apparently concurred in by Lopes, L.J., that the matter was covered by Section 11 of the Married Women's Property Act. This section provides that where a life policy is "expressed to be for the benefit of" the assured's spouse or children, it shall create a trust in favour of the objects therein named; the assured may appoint trustees of the policy money, and in default of such appointment "such policy . . . shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid." Fry, L.J., held that, the assured not having appointed trustees, the section vested the policy in him and his personal representatives, and that they were therefore entitled to sue on it. It may be noted that this way of deciding the case would not have been open if the assured had appointed trustees. For this reason a more effective line would, it is submitted, have been to decide that the wife was entitled to the policy money as against the insurance company, but that she then held it on a resulting

[7a] Except that in the latter case there was an argument upon Sect. 42 of the Bankruptcy Act; see later.

[8] [1892] 1 Q.B. 147.

or constructive trust for the husband's personal representatives.[9] This would have reached the desired result by a slightly different route. However this may be, it is clear from Fry, L.J.'s, judgment that *Cleaver's* case cannot be regarded as an authority contrary to the principle of *Re Stapleton-Bretherton* and *Re Schebsman*. In *Re Stapleton-Bretherton* Simonds, J., distinguished *Cleaver's* case as one in which "the destination of the covenanted sums is a matter of indifference to the covenantor," but in *Re Schebsman* Uthwatt, J., rightly held that this was not in itself a reason for enabling B to enforce performance of the contract in a different mode from that agreed. He disapproved the view of Lord Esher, M.R., in *Cleaver's* case, and approved the judgment of Fry, L.J., which, as mentioned, proceeded on a different ground.

It is submitted that not only cannot B recover from A the money that A has promised to pay C, but if A does pay C in accordance with the contract B has no action against C to recover the amount of the payment, unless of course C received the payment as agent or trustee for B. It is further submitted that the fact that B has rendered the consideration for the promise does not make C a resulting trustee for him. The decision of the Court of Appeal in *Re Schebsman* does not go the whole length of this proposition. All three members of the Court concurred in saying that in no circumstances could B sue C *at common law* in an action for money had and received, but two out of the three did not commit themselves to saying that in no circumstances would there be a resulting trust. Lord Greene, M.R., contented himself with holding that there was no resulting trust in the particular case for the several reasons that: (1) "C" in the above formula consisted of B's wife and daughter, and any presumption of resulting trust was therefore rebutted by the presumption of advancement; and that (2) the presumption of resulting trust was negatived by the fact that in the particular case, A, the promisor, had an interest in seeing that B's wife and daughter were provided for. Luxmoore, L.J., put the second point in a slightly different way, saying that the consideration was not supplied by B alone but was mutual and was supplied by both A and B. Only du Parcq, L.J., was bold enough to deny altogether the possibility of resulting trust; he rested his opinion upon the "clean hands" doctrine, and held that equity would not assist B to divert money to his own pockets that by the terms of the bargain was to be paid to C. Du Parcq, L.J.'s, judgment seems to be, if one may respectfully say so, the preferable one. The doctrine of resulting trust has already been carried to an extreme,[10] and it would be a misfortune if it were extended to the type of case here discussed. It is surprising enough that where A contracts with B to confer a benefit upon C, the law should refuse to enforce the bargain at the instance of C. But it would be extraordinary if, when the contract has been carried through, the law should stultify the transaction by making C hold on a resulting trust for B. It is humbly submitted that this is not the rule of equity, and that, if it is, the rule stands in need of legislative change.

[9] But see Ames, *Lectures on Legal History*, 320, who takes the rigorous view that if the law recognises the right of the third party under the contract, the result on the facts of *Cleaver's* case ought to be that the insurer is relieved of all liability.

[10] An illustration of the absurd length to which it has been stretched is *Re Vinogradoff*, [1935] W.N. 68, where a lady had transferred War Loan into the joint names of herself and her granddaughter (to whom she was not *in loco parentis*). Farwell, J., held that the granddaughter, a child of four years at the date of the transfer, was a trustee of the property for her grandmother.

Lord Greene, M.R., was alive to the unfortunate consequences of holding a resulting trust to be created. He took the illustration of B, a promisee under a contract for the benefit of C, who dies in the belief that he has by the contract made provision for C. If the doctrine of resulting trust were applied, B's representatives would, as he pointed out, be bound to claim restitution from C of the benefit obtained by C, and B's intention of making provision for C would be frustrated. The presumption of advancement would save the situation in some cases, but not in all.

This question of resulting trust is important not only as between B and C but also as between B and A. Suppose for the moment that, after the money has been paid to C, B can recover it from him under a resulting trust. It would follow that, before the money has been paid to C, B could in equity claim it direct from A (joining C as a co-defendant), for this would merely avoid circuity of action. The conclusion was accepted by the Court of Appeal in *Re Schebsman* as a valid inference from the premise. We have already seen how the judges dealt with the premise.

A few words may be said on certain decisions before *Re Schebsman*, the validity of which seems to be contestable. In *Re Engelbach* (1924),[11] B took out an endowment policy with the A Co. under which the insurance money was to be paid to C, who was B's daughter. The money was paid to C under the terms of the policy,[12] and B claimed to recover it from C. Romer, J., as he then was, held that he was entitled to do so. The case is usually discussed as an illustration of a contract that does not create a trust, but in fact it seems to have been wrongly decided even on the assumption that the contract of insurance did not create a trust. The promisor had fulfilled his contract according to its terms, and there was no satisfactory reason for allowing the promisee to recover from the beneficiary the amount of the benefit. C being B's daughter, it could not be argued that there was any resulting trust. The learned judge did not address his mind to this aspect of the matter, nor does it seem to have been argued.

In *Re Schebsman* the Court was unnecessarily tender towards this decision. Uthwatt, J., and, on appeal, Luxmoore, L.J., regarded it as justified by the view that the insurance company was nothing more than the mandatory of the father to pay the sum assured to the daughter. With all respect, this is only a verbal solution of the difficulty raised by the case. Lord Greene, M.R., said that he did not question the correctness of the decision upon the particular facts; nevertheless he gave no reason for supporting it beyond alluding to the explanation given of it by Simonds, J., in *Re Stapleton-Bretherton*. Simonds, J.'s, explanation was that "the proper inference from the document itself and from such surrounding circumstances as may properly be taken into consideration, is that the destination of the covenanted sums is a matter of indifference to the covenantor, so that the designated payee may be regarded as the nominee of the covenantee, and, as a matter of construction, the covenant can be read as if the words 'or as the covenantee may direct' were inserted after the name of the payee." If this means that the mere fact that the destination of the covenanted sums is a matter of indifference to the covenantor justifies the Court in implying the words "or as the covenantee may direct," it seems to be contrary to the decision of Uthwatt, J., in the

[11] [1924] 2 Ch. 348. Cp. the criticism of Corbin in (1930) 46 L.Q.R. at 39.

[12] The statement of facts in the Law Report version is not quite clear on this, but it appears clearly from the report in 93 L.J. Ch. 616 at 617.

Court below in *Re Schebsman*, with whose reasoning Lord Greene expressly agreed. The alleged implied term, said Uthwatt, J., "would be excluded by an express provision that payment was to be made to the stranger and in no other manner, even though the method of payment was of no importance to the obligor, and the only question which would then remain for decision—a question which does not turn on the terms of the contract—would be whether the stranger received the sums for account of the obligee or on his own behalf." If this is so, Simonds, J.'s, explanation of *Re Engelbach* breaks down. In *Re Engelbach* there was an express provision that payment was to be made to the stranger (Uthwatt, J.'s, phrase "and in no other manner" seems to be redundant), and there were no grounds for implying a term to vary this provision. In any case, as Uthwatt, J., pointed out, the question whether B can recover from C a payment received by C does not depend on the terms of the contract between A and B. It depends on the law of restitution—i.e. of quasi-contract and of resulting and constructive trusts. Now it is clear from *Re Schebsman* that there was no right of quasi-contractual recovery in *Re Engelbach*, and it is equally clear that there was no resulting trust, if only because that would be neutralised by the presumption of advancement. The possibility of a constructive trust also can be ruled out. It seems to follow, as said before, that *Re Engelbach* was wrongly decided.

Another cloudily-reasoned and also misleadingly-reported case is *Re Policy* 6402 *of Scottish Equitable Life Assurance Society* (1902),[13] which has been provocative of much comment. B took out a policy on his own life "for behoof" of C, his wife's sister. The policy provided that C should be entitled to receive the policy money on B's death. B survived C and continued to pay the premiums till his death. On his death the policy money was paid into Court, and B's executors took out a summons to determine whether the money belonged to them or to the personal representatives of C. Joyce, J., held that as B had paid all the premiums and as there was no presumption of advancement, B's personal representatives were entitled to the policy money. He expressed his conclusion by saying that "although the legal personal representative of the lady in this case [C] would be the person entitled to receive the money at law and to give a receipt for it, in equity the money belongs to the legal personal representatives of [B], who took out the policy." It is submitted, with due respect, that this was a misconception of the position. The question *in limine* was whether C had an equitable right under the policy—or, as it is usually put, whether B was a trustee of the policy for C. This question was not explicitly dealt with by the learned judge.[14] Presumably he would have answered it in the negative, for he concluded that C had no equitable right to the policy money. If this question was so answered in the negative, it is submitted that the question raised by the summons became unanswerable. Assuming that there was no trust of the policy, the insurance company had a right at their option either to pay the policy money in accordance with the terms of the policy to C's representatives, or to alter the mode of performance at B's executors' request by paying them. But C's representatives had no right to demand the money (C not having been a party to the contract at law or in equity), nor B's executors either. B's executors' only right was to insist that the company paid the money to C's representatives, though B's executors could offer to receive payment

[13] [1902] 1 Ch. 282.
[14] Cp. Romer, J., in *Re Engelbach*, [1924] 2 Ch. at 354.

themselves, and this would give the company a choice as to payment. On the facts the company had not elected, and so the question in the summons was unanswerable.

Joyce, J.'s, discussion of the presumption of advancement was irrelevant because that presumption simply neutralises the presumption of resulting trust, and here there could be no resulting trust because C's representatives had never received any property of which they could be trustees for B's executors. The report is misleading because the headnote states that C's representatives were trustees of the money, which suggests the (incorrect) inference that they had received it.

There is only one way in which the questions of resulting trust and of advancement could have been considered to be relevant, and that was by introducing the rule against circuity of action. It is possible that the learned judge had this rule in mind, but he did not expressly refer to it. In any case, as has been pointed out, the judgment of du Parcq, L.J., in *Re Schebsman* is now an authority against implying a resulting trust in such circumstances.

A similar criticism applies to the decision of Crossman, J., in *Re Foster* (1938).[15] The facts were that B insured his son's (C's) life, B being named in the policy as the assured and the policy money being payable to C's representatives or assigns. After the death of B and C the insurance company paid the policy money on the joint receipt of the respective representatives of B and C. An originating summons was then taken out in respect of the two estates to determine whether the money belonged to the estate of B or to the estate of C. Crossman, J., purporting to follow *Re Engelbach*, held that it belonged to the estate of B. The learned judge did not direct his mind to what (speaking with all respect) was the crux of the case, namely, the payment by the insurance company into joint names. If it be granted that the insurance company had a right to pay either B's representatives (with their consent) or C's representatives, the question for decision was, what was the effect of a payment into the joint names of both? This might have been held to be not an exercise by the company of its right of election, but only an interim measure, and in that case the question raised in the summons ought to have been regarded as unanswerable. Alternatively, the payment might have been regarded as a final payment into joint names, in which case the two estates might have been regarded as jointly entitled. But to hold that B's estate was solely entitled was, it is submitted, open to the same objection as the decisions in *Re Engelbach* and *Re Scottish Equitable*. As in *Re Engelbach*, no question of resulting trust could arise, because of the presumption of advancement.

We now come to the exceptions or quasi-exceptions to the rule that a third-party beneficiary cannot sue upon a contract. These may be listed as follows: (1) where the promisee contracts as agent for the beneficiary; (2) where the promisee contracts as trustee for the beneficiary; (3) where the promisee assigns his contractual right to the beneficiary; (4) where the contract can be regarded as creating a trade usage that is read into another contract to which the beneficiary is a party. Case (1) needs little comment. It is not a convenient mechanism for establishing rights in the beneficiary. There is frequently great difficulty in finding agency in fact; even if the Court is prepared to say that agency exists, there is still the stumbling-block that the principal cannot enforce the contract unless he

[15] *Re Foster, Hudson* v. *Foster*, [1938] 3 All E.R. 357.

gave consideration;[16] and finally, to infer agency means that the contract not only benefits the principal but may also burden him. It need hardly be added that the case is not in legal theory an exception to the general rule, for where the relationship of agency is found to exist the principal becomes a party to the contract, not a third-party beneficiary. Case (4) needs no discussion for the purpose of this paper,[17] and we are thus left with only cases (2) and (3).

As is well known, equity before the Judicature Act did not by any means prostrate herself before the common-law rule denying contractual rights to the third-party beneficiary. On the contrary, the result of various cases decided in equity both before and since that Act has been to provide the Courts with a perfect or almost perfect[18] method of reversing this common-law rule, if they feel so inclined. (The method used will for the moment be assumed to be an application of the trust concept; how far this is a correct assumption will be considered later.) There was a time, indeed, when the way seemed to be clear for a generalisation that whenever parties intended by their contract to confer a benefit upon a stranger, the stranger had an action in equity for the benefit intended.[19] This was the argument of Professor Corbin in an important article published in 1930,[20] *Dunlop* v. *Selfridge* (1915),[21] which seemed the strongest authority to the contrary, could be explained as a case where "the plaintiff did not join the promisee as co-plaintiff and apparently made no argument that the promisee was a trustee"[22] also, it was counterbalanced by the later decision (also of the House of Lords) in *Les Affréteurs, etc.* v. *Walford* (1919).[23] Since Professor

[16] *Dunlop* v. *Selfridge*, [1915] A.C. 847. Lord Atkin in *McEvoy* v. *Belfast Banking Co.*, [1935] A.C. 24 at 43, suggested that the principal could enforce the contract although he gave no consideration, if the agent (who furnished the consideration) contracted on his own behalf as well as on behalf of the principal. But see *per* Viscount Haldane, L.C., in *Dunlop* v. *Selfridge*, [1915] A.C. at p. 854.

[17] See, upon it, O. Kahn-Freund, "Collective Agreements under War Legislation" (1943), 6 Mod. L. R., at pp. 117–18; Williston, *Contracts*, revised edition, iv, Sect. 1056.

[18] It is sometimes assumed that a defect of what we may for the moment call the trust concept as applied to third-party rights is that it prevents the parties to the contract from varying or rescinding the contract without the beneficiary's consent (so the Law Revision Committee: Cmd. 5449 of 1937, p. 30). This rule is supported by dicta of Jessel, M.R., in *Re Empress Engineering Co.* (1880), 16 Ch.D. 125 at 129, and of Cotton, L.J., in *Re Flavell* (1883), 25 Ch.D. 89 at 102; cp. *Harmer* v. *Armstrong*, [1934] Ch. 65. But see, for a contrary view, *Hill* v. *Gomme* (1839), 5 My. & Cr. 250 at 255–6. This case shows that the alleged rule, even if it be adopted, is not an inevitable consequence of applying the trust concept.

Another criticism of the trust concept made by the Law Revision Committee (*op. cit.* 29) is that, according to the strong weight of authority, the beneficiary must sue in the name of the promisee-trustee, or join him as co-plaintiff or co-defendant: see Finlay, *Contracts for the Benefit of Third Persons*, 52–4; *Gandy* v. *Gandy* (1885), 30 Ch.D. 57; *per* Tomlin, J., in *Royal Exchange Assurance* v. *Hope*, [1928] Ch. 179 at 185; *Harmer* v. *Armstrong*, [1924] Ch. at 82–5, 93–4. *Contra*, *Kelly* v. *Larkin*, [1910] 2 Ir.R. 550; *Mulholland* v. *Merriam* (1872), 91 Grant Ch. 288 (Ont.). But this is not a serious objection.

[19] The proposition would not, of course, cover a mere unintended or casual benefit to a stranger. Thus the *Contracts Restatement*, which recognises the rights of third-party beneficiaries, suggests that if A contracts to buy B a new car of specified make, the makers of the car are merely "incidental beneficiaries" and could not enforce the contract (Sect. 133, Illustration 12).

[20] "Contracts for the Benefit of Third Persons" (1930), 46 L.Q.R. 12.

[21] [1915] A.C. 847. [22] Corbin, *op. cit.* 36. [23] [1919] A.C. 801.

Corbin wrote, however, there have been several retrograde decisions, particularly that of the Privy Council in *Vandepitte's* case (1933).[24] The result is that at the present day the way in which the Court will decide a novel case is almost completely unpredictable. Everything seems to depend on the whim of the judge. As Professor Winfield puts it, "when the Courts wish to enable the beneficiary to sue they make the promisor a trustee, and when they wish to prevent him from doing so they fall back on the shibboleth of privity of contract."[25] Indeed, it may be wondered whether, in view of the recent cases, this statement does not exaggerate the flexibility that judges allow themselves. Judges now seem to be in process of throwing away the valuable tool that their predecessors in the courts of equity put into their hands, so that, by the operation of the doctrine of precedent, they are coming to prevent themselves from finding the existence of a trust even when, as a human matter, they would wish to protect the beneficiary. From this point of view *Re Stapleton-Bretherton* and *Re Schebsman* are two more nails in the coffin of Professor Corbin's argument. In the former case the intention of the two contracting parties to provide for their respective families by mutual covenants was as clear as daylight; the contract had no other purpose; yet the judge held himself bound by such cases as *Cleaver's* case, *Re Engelbach* and *Re Sinclair's Life Policy* (1938),[26] to hold against a trust. This practice of citing authority for a finding that no trust was intended seems to be as open to objection as the other practice, condemned in the modern "precatory trust" cases, of citing authority for a finding that a trust was intended. *Re Schebsman* is perhaps a slightly more difficult case. The facts were that a firm agreed with its employee, in consideration of his retirement, to pay certain sums to him and after his death to his family. The slight difficulty just referred to arose from the unusual fact that the stipulation for the benefit of the family was inserted at the instance not of the promisee but of the promisor (the firm). At the same time, it is hard to see any reason why this should affect an equitable construction of the matter as a trust by the promisee, for a man can become a trustee at the desire of another as well as at his own desire. The Court, however, refused to find any trust. "The cases," said Uthwatt, J., "no doubt, are hard to reconcile, but, to my mind, the explanation of them is that different minds may reach differing conclusions on the question whether the circumstances sufficiently show an intention to create a trust."[27] These are soothing words, but

[24] [1933] A.C. 70. The case has been much criticised: see (1932) 10 Can.B. Rev. 381; (1933) 49 L.Q.R. 476; Finlay, *op. cit.* 37–44.

[25] *Province of the Law of Tort*, 107. Cp. Buckland and McNair, *Roman Law and Common Law*, 165: "Where the Court thinks that justice requires that third parties should have a remedy it constructs a trust in their favour, even though the parties to the contract have not used the language usually associated with trusts."

[26] [1938] Ch. 799.

[27] [1943] Ch. at 370. Similar statements were made in the Court of Appeal. "An examination of the decided cases does, it is true, show that the Courts have on occasions adopted what may be called a liberal view on questions of this character, but . . . it is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention" (*per* Lord Greene, M.R., [1944] 1 Ch. at 89). "It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention" (*per* du Parcq, L.J., at 104).

they hardly dispel the fear that in fact no principle whatever underlies the decisions. The question is, what is meant by "an intention to create a trust"? It is generally admitted that there is no requirement that the parties should know the law, nor that the word "trust" should be used in the contract.[28] What, then, is the mental attitude required of the promisee or promisor before the promisee is regarded as a trustee of the promise? Surely, all that can be expected of a non-lawyer who has never heard of trusts of promises is an intention that the third party shall benefit under the contract. The statement that the promisee is then a trustee of the promise made to him is simply a lawyer's way of expressing that intention. Now, whenever a contract provides for payment to a third person, it necessarily follows that that third person will benefit under the contract, provided that the contract is carried out (as presumably the parties expect it will be), and provided that the law does not undo it by the presumption of resulting trust. Therefore, whenever parties contract for money to be paid to a third person their intention to benefit that person is reasonably plain. If this is so, cases like *Re Schebsman* can only be regarded as unsatisfactory on the trust point. The whole question sorely needs to be authoritatively reviewed by the final tribunal;[29] or, better still, the Law Revision Committee's Sixth Interim Report[30] should be implemented by legislation.

We pass to what is more germane to the purpose of this inquiry, the way in which the trust concept fits in with the common-law rules as to the promisee's right. Professor Corbin rightly insists that when equity lawyers spoke of trusts in connection with contracts for the benefit of third parties, they were not speaking of trusts of tangible property received under the contract. They were speaking of trusts of the promise, of the chose in action created by the contract. A chose in action is regarded for some purposes as property, and it is so for the purpose of being the subject-matter of a trust. The theory may be explained in elementary language as follows. Suppose that A promises for value to pay B £100. B then has a right to the £100, and he may validly declare himself a trustee of this right for C. If he may make the declaration of trust after the contract, he may equally do so in the contract, and may stipulate that he is to receive the £100 as trustee for C. This way of looking at the matter supplies a plausible reason why in this case equity helps a volunteer.[31] Normally equity will not enforce a trust at the instance of one who has given no value, but it will do so where the trust is completely constituted. Here, it may be said, there is a completely constituted trust of a chose in

[28] See, e.g. *Re Webb, Barclays Bank, Ltd.* v. *Webb*, [1941] 1 All E.R. 321.

[29] A pointer of the way in which the best legal opinion is moving is Lord Wright's praise of the American rules in (1939), 55 L.Q.R. at 208. He calls the application of the trust concept a "cumbrous fiction." Certainly the way we now work it is cumbrous.

[30] Cmd. 5449 of 1937.

[31] That equity will help a pure volunteer in such cases is evident from cases like *Re Webb* (above) and *Royal Exchange Assurance* v. *Hope*, [1928] Ch. 179. But see *Gandy* v. *Gandy* (1885), 30 Ch.D. 57. The trouble felt in cases like *Gandy* v. *Gandy* is that the introduction of the idea of trusts of choses in action threatens to upset the settled equitable principles that volunteers cannot enforce marriage articles or assignments of expectancies. See generally Underhill, *Trusts*, 8th edition, Art. 8; Farrer, "Action for Damages on a Voluntary Covenant" (1939), 4 The Conveyancer (N.S.) 71; *Re Brooks, Lloyds Bank* v. *Tillard*, [1939] Ch. 993. However these two questions are settled, they ought not to be allowed to affect the general question in the law of contract.

action, it being well settled that a declaration of trust of property makes the trust completely constituted.

This theory is valid where the promise is to pay money or transfer property *to B* as trustee for C. In this case B can clearly sue A at common law for the full amount, the words in the contract "as trustee for C" being meaningless from the point of view of the common law. B can therefore be regarded in equity as trustee for C of his common-law right to the money. There is, however, a serious difficulty in the way of the theory where the promise is to confer the benefit *directly upon C*. On the trust theory, the beneficiary can have no greater right than his trustee. Now it was shown in the earlier part of the paper that where A makes a promise to B to pay C, B's only right against A in the event of a breach by A is a right to nominal damages. Therefore, on the theory above outlined, C's right should be the same. When one turns to the cases one finds that it is not the same, and this therefore seems to disprove the "trust" theory for the particular situation now being discussed. In *Lloyd's* v. *Harper*,[32] for instance, where the promise was to guarantee debts that might become owing to the beneficiaries, the promisee-trustee recovered not merely the nominal damages that he could have recovered had he been suing for his own benefit, but all that the beneficiary could have recovered had the contract been made with himself. That this was not simply a misapprehension of the effect of the Judicature Act is clear from the fact that before that Act the Court of Chancery[33] and the Court of Exchequer in its equity jurisdiction[34] had done exactly the same. A particularly illuminating case before the Judicature Act is *Peel* v. *Peel* (1869).[35] A had agreed for value with B to pay an annuity to C during the joint lives of A and C. Afterwards A and B referred the question of A's liability to arbitration. The award was against A and A declined to comply with it. A bill in equity was filed by B and C against A to enforce compliance with the award or (alternatively) for specific performance of the previous agreement. It was argued for the defendant, A, that a decree of specific performance of an award or promise for the payment of money was unknown, and that the remedy was at law. To this James, V.-C., replied: "But the difficulty at law would be, who is to bring the action? The person who would bring the action is not the person who has sustained the damage." He therefore held that the suit lay.

This case and the others just referred to knock on the head the idea that all that equity did was to act behind the scenes of a common-law action. Equity did more; it allowed the beneficiary a direct action in equity, and it gave him a measure of compensation that he could never have got by means of an action in the name of the promisee-trustee at law. This being so, it is questionable whether the language of "trust" is appropriate to these cases. A trust is commonly understood to be a trust of property. In cases like *Lloyd's* v. *Harper* and *Peel* v. *Peel* the chose in action that constitutes the property of which the trust is supposed to be declared is not a legal chose in action (for that merely gives a right to nominal damages), but an equitable chose in action. Now it is true

[32] (1880), 16 Ch.D. 290. See particularly *per* Lush, L.J., at p. 321. See also *West* v. *Houghton* (1879), 4 C.P.D. 197, where it was conceded by the Court that if there had been a trust of the covenant, substantial damages could have been awarded.

[33] E.g. in *Tomlinson* v. *Gill* (1756), Ambler 330.

[34] E.g. in *Lamb* v. *Vice* (1840), 6 M. & W. 467.

[35] 17 W.R. 586.

that an equitable chose in action is equitable property, and that (according to the usual assumption) there may be a trust of equitable property, but the latter proposition presupposes that equitable property is in existence before the creation of the trust. When equitable property is already in existence, and the equitable owner declares himself a trustee of it for another, the language of trust is perhaps not inapposite (though the case might more simply be analysed as an assignment of the equitable property). In the present instance, however, there is no point in using the language of trust. The equitable chose in action is created by equity entirely for the benefit of the stranger to the contract, and at no point of time is it any property of the supposed trustee in his own right. To speak of a trust in such a case is therefore to suppose that the mere declaration of trust creates the property out of which the trust is declared. Another peculiarity is that the supposed trustee has no powers or duties. The only reason for calling him a trustee is that he must be joined as a party to the action, but the necessity for this arises simply from the desirability of binding him by the judgment, not from the fact that he is in other respects a trustee. It is submitted that in truth the language of trust is nothing but pleonasm, and that what actually happens is that equity in appropriate cases allows the beneficiary to sue in the court of equity upon the contract. This conclusion is irreconcilable with the rule that equity will not aid a volunteer, and it must therefore be regarded as an exception to it.

The conclusion is of great importance on the question of insurable interest. One of the propositions advanced by the Privy Council in *Vandepitte's* case[36] was that where B purports to insure C against third party risks, the policy is void in respect of such risks because B has no insurable interest in them. The answer is, it may be suggested, that C being a party to the insurance contract in equity, C is the insured in respect of this risk, and not B. B has nothing to do with it. The idea that he has springs from the unnecessary view that he is the trustee of a chose in action for C.

Turning to assignments, the ordinary case of assignment need not be considered, but a few remarks may be addressed to the problem whether the law of assignment can be used to circumvent the rule against recovery by a third-party beneficiary. Mr. J. A. Weir has elaborated an interesting argument that it can.[37]. If A by a written contract promises B to pay C £100, this may be effectuated by reading it as (1) a contract to pay B £100 coupled with (2) a statutory assignment by B to C, of which written notice is given to A by the same piece of paper. By similar reasoning, even an oral contract in the same terms may be effectuated by reading it as contract plus equitable assignment, provided that C, the assignee, has given value for the assignment or that value is not necessary for an equitable assignment.[38]

That the English Courts up to and including the Court of Appeal will reject this argument is now clear from *Re Schebsman*. In that case B had become bankrupt within two years of the contract. It was argued by his trustee in bankruptcy that the contract was severable as above suggested,

[36] [1933] A.C. 70 at 80–1.

[37] (1932), 10 Can. Bar Rev., 389–91. Cp. Willis in (1936), 14 Can. Bar Rev., 457 ff.

[38] See on the latter question R. E. Megarry, "Consideration and Equitable Assignments of Legal Choses in Action" (1943), 59 L.Q.R. 58; H. A. Holland, "Further Thoughts on Equitable Assignments of Legal Choses in Action," *ibid.* 129.

and therefore that there was an assignment by the bankrupt which constituted a settlement by him voidable by his trustee in bankruptcy under Section 42 of the Bankruptcy Act, 1914. The argument was rejected by Uthwatt, J., whose judgment on this point was expressly adopted by the Court of Appeal. "In my opinion," he said, "the transaction is not capable of being dissected in the way suggested."[39] It may be noted, however, that on the actual facts the proposal that the payment should be made to C came not from B but from A. If in some later case the proposal comes from the promisee, B, it is possible to imagine *Re Schebsman* being distinguished on this ground. *Re Schebsman* shows, however, that the result of an implied-assignment theory of the third party's rights, or of a declaration-of-trust theory, is to imperil the third party's rights if the promisee becomes bankrupt within two (or, in certain circumstances, ten) years of the contract. On the other hand, the theory above suggested, that the third party has direct rights in equity under the contract, not derived from any rights of the promisee, is not subject to this difficulty.

Even if the implied-assignment theory were adopted by the Courts, it would not work for certain types of contract. For instance, if A contracts with B to perform a personal service for C, C could not on the assignment theory get more than nominal damages in the event of breach by A, for he can be in no better position than his assignor B.

This last difficulty should in theory defeat an attempt by a promisee (B), under a contract that provides for a benefit to be conferred on a donee-beneficiary (C), to effectuate the contract by expressly assigning his rights to the donee-beneficiary. Assuming that the contract is held not to have created a so-called trust for C (i.e. not to have conferred equitable rights upon C), and assuming that it is not one of which specific performance will be decreed, and assuming that the theory of implied assignment is ruled out, it is conceived that C's only right under the express assignment is to recover nominal damages in the event of breach. There are several reasons why he should not be allowed to recover the whole sum promised, or substantial damages for the value of any other benefit promised. In the case of an equitable assignment of a legal chose in action, the assignee before the Judicature Act sued at law in the name of the assignor, and therefore recovered only what the assignor could have recovered. The position should therefore be the same to-day. Moreover, whether the assignment be legal or equitable, it is "subject to equities," which means, generally speaking, that the assignee steps into the position of the assignor as at the date of notice of the assignment being given to the debtor. To put the same point by another formula, assignment is, in general, subject to the rule *Nemo plus juris transferre potest quam ipse habet*. Finally, so far as damages are concerned, the promisor's liability is restricted by the rule in *Hadley* v. *Baxendale*.[40] If at the time of making the contract he could not foresee any damage to the promisee as likely to result from a breach of his contract to benefit the third person, it is difficult to see how, consistently with *Hadley* v. *Baxendale*, the damages payable by him can be increased by an assignment.

These legal difficulties were not perceived in the case of *Butler Estates Co.* v. *Bean* (1942)[41] which, therefore, affords little assistance upon them. The facts of the case, slightly simplified, were as follows. C leased premises

[39] [1943] Ch. at 376.
[40] (1854) 9 Ex. 354.
[41] [1942] 1 K.B. 1.

to B, a limited company. B Co. went into liquidation and assigned the lease to A, who convenanted with B. Co. to pay the rent and observe the tenant's covenants in the lease. B. Co. assigned the benefit of the covenant to C, the lessor (written notice of this assignment being given to A), and paid a sum to C by way of compromise of his claim to future rent. B Co. was then wound up. A later assigned the lease to X, who failed to pay the rent. C, the lessor, sued A for the rent, claiming as assignee of A's covenant to B Co.

The only question argued was as to the construction of A's covenant with B Co. Was it a covenant to pay the rent (according to the ordinary meaning of the words), or was it to be read as a mere covenant to indemnify B Co. against its liability to pay the rent? If the latter, B Co. was clearly under no liability to pay the rent after C had compromised his claim, and B Co. had been wound up. On that view A could not be liable under his covenant. The Court of Appeal, however, construed the covenant according to its literal wording, holding it to be a covenant to pay the rent. It was then assumed without further argument that the result of this interpretation was that C, the assignee, could sue A for the rent. This result could easily have been reached (without reference to the assignment) in those American jurisdictions that protect the creditor-beneficiary. In the Court of Appeal, however, the question of trust (as an English lawyer would call it) was not argued, nor was the implied-assignment theory; and the Court assumed that C's rights depended wholly on the express assignment to him. Looking at the case in this way, it is difficult to see how C succeeded. As an assignee, he ought not to have recovered more than his assignor could have recovered. Let us consider in what circumstances the assignor, B Co., could have recovered the rent from A.

Suppose that, after taking the covenant from A, B Co. had remained in existence, and had not assigned the covenant to C nor compromised C's claim for rent, and that A had remained in possession of the premises and defaulted in payment of the rent. Could B Co. then have recovered the rent from A under the covenant, even though it had not yet had to pay this rent to C? If so an awkward situation may arise. A may have judgment recovered against him by B Co., and have execution levied against him under the judgment. Later C may recover another judgment against A for the same sum on privity of estate. There seems to be no principle on which A will then be able to recover from B Co. the sum he has had to pay it for breach of his covenant to pay the rent.

Much the better view seems to be to say that B Co. cannot recover from A the full rent unless they have paid it; unless they suffer actual damage through A's breach of covenant they can recover only nominal damages. But if this is so, we return to the question: on what principle was C in the instant case given greater rights against A than his assignor had? Was it because the assignment was statutory (if such was the case), not merely equitable?[42] Or does the decision apply equally to equitable assignments? Is it a general decision to the effect that in actions by an assignee the damages are to be based on the loss to the assignee, not on the loss to the assignor? Or has it a more limited scope, and if so, what scope? The simplest answer to these questions is to say that, since the matter passed *sub silentio*, the case is no authority upon it.[43] If a moral

[42] The report is silent on the nature of the assignment.

[43] "It is as unsafe as ever it was to rely on the supposed authority of a case for a point not expressly discussed and passed upon, but supposed to be implied

may be drawn it is that the adoption of the American rules would save all this trouble.

Summary

The results of this discussion may be briefly summarised as follows. Where A contracts with B to confer a benefit upon C, who is no party to the contract—

(i) if A fails to perform, B suing on his own account can recover only nominal damages, unless he has suffered actual damage; though he may sue in quasi-contract for restitution of benefits conferred by him upon A. B may also in a proper case obtain specific performance against A.

(ii) if A wishes, he is entitled at common law to fulfil his contract according to its terms, and if he does so B cannot sue C in quasi-contract in respect of money or other benefits so received by C from A. Nor, it is submitted, ought it to be held that in equity C holds such money or other benefits as on a resulting trust for B, unless there is some special element in the relation between B and C that raises such a trust. The cases on this point are, however, in some confusion. Where the facts are such that C would, if he had received the benefit, hold on a resulting trust for B, the rule is that B can, before A's performance, sue A directly for the benefit, joining C as co-defendant as a matter of form.

(iii) at common law C cannot sue A on the contract. The Court of Appeal has rejected the argument that C is an implied assignee from B. In some cases equity will allow C to sue, but the circumstances in which it will do so cannot be formulated on the present state of the authorities. Where C is thus allowed to sue, although as a matter of procedure he may have to join B as a party to the action, the action is in his own right, and the damages or other sum that he recovers are not limited to the damages or other sum that could have been recovered by B.

(iv) if B expressly assigns his contractual right to C, it is submitted that C cannot, in virtue of the assignment, recover more than B could have recovered.

GLANVILLE WILLIAMS.

in the decision. 'The attention of the Court was not called to that point'; many a plausible argument has been checked by that answer, always legitimate and sometimes complete" (Pollock, *Expansion of the Common Law*, 33). It is not easy to find precise judicial authority for this proposition, but I am indebted to Dr. T. Ellis Lewis for referring me to the older authorities bearing upon it. Originally the phrase "precedent *sub silentio*" was contrasted with "judicial precedent," the former meaning a mere practice of clerks that had never come before a Court, and the latter meaning a pronouncement of the Court. The former was regarded as inferior in authority to the latter. See *Slade's* case (1602), 4 Co. Rep. 94a; *R.* v. *Bewdley* (1712), 1 P. Wms. at 223; *R.* v. *Hare* (1719), 1 Str. at 153; Wynne's *Eunomus* (*circ.* 1774), p. 511. It appears from *Slade's* case that a judicial precedent was regarded as authority for a proposition necessarily involved in it even though the point was not expressly adverted to, for "it shall be intended that some of the counsel with the defendant, or some of the justices before whom the action was tried, and the record read, would have excepted against it, if in their judgment the action was not maintainable." Concurrently, however, another meaning of the phrase "precedent *sub silentio*" grew up, and has superseded the first. In this sense it means a judicial precedent where the particular point for which the precedent is cited was not expressly noticed by the Court, but was involved in the decision. Such a precedent is said to be of inferior authority. See Vaughan, 399; Dougl Rep. Pref., p. 7 (3rd ed.); *Peek* v. *Gurney* (1873), L.R. 6 H.L. at 397. A particularly strong case, for which I am indebted to Mr. R. E. Megarry, is *Lindsay County Council* v. *Marshall*, [1937] A.C. at 125, where Lord Wright disregarded *Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 243, a previous decision of the House, on the ground that the point for which it was cited was not raised in it.

LEGAL AID AND SOCIAL SECURITY

THE impact of the new social order on the existing machinery of justice is creating a problem of great intricacy. The administration of the law, if it be good, cannot be cheap. To the layman our legal machinery with its division of the profession, expensive process, variety of courts, and strange mixture of learning and common sense may appear cumbersome and illogical, but there is general agreement that our legal system is superior to any other. Whilst this pride in English justice is well founded it cannot be denied that many members of the community find difficulty in availing themselves of the remedies the law provides through the absence of the funds necessary for the functioning of the legal machinery involved. The social consequences of the war have, on the whole, intensified this difficulty, and given rise to a sense of helplessness in the individual who, if ignorant of all the facts, may well suspect that the protection of the law, at least in civil cases, is open only to those who can afford to pay for it. This is a dangerous and unhealthy state of affairs. A way must be found, without basically interfering with the existing fabric of legal procedure, whereby every member of the community, whatever his financial position, may be able to set in motion and maintain in operation the machinery of justice. Procedure must not be permitted to frustrate principle nor means to defeat ends.

I

In the past this problem has repeatedly received public attention and various Lords Chancellor have appointed Committees to report on the agencies of free legal advice.[1] So far as legal advice to poor persons is concerned the only determined effort to deal with the problem has been made not by the State but by the legal profession. Before the war members of both branches of the profession operated in England and Wales 125 free legal advice centres whose methods, organisation and finance have been described by Mr. J. Mervyn Jones in his excellent report on "Free Legal Advice in England and Wales."[2] The fifty-five centres operating in London were affiliated to the Bentham Committee, which likewise was created by the voluntary co-operation of solicitors and counsel in 1931. The Committee establishes free legal advice centres, fills vacancies at the various centres, secures a high professional standard in their administration and carries legal aid in appropriate cases beyond mere advice to detailed negotiations and representation in Court through a rota of professional men who give their services free of charge. The work done by members of the profession in these centres and committees has been described by Lord Maugham[3] as being of great social and philanthropic value, and as entailing a sacrifice of leisure and convenience by hard working professional men and others which cannot be estimated in money.

The social evolution accompanying the war has thrown the problem of free legal aid into a different perspective; for the conception of charitable assistance to the pauper is yielding to the ideal of social service to the

[1] E.g. Lord Finlay's Committee, 1926 (Cmd. 2638), 1928 (Cmd. 3016). In 1937 the Secretary of State for Scotland appointed a Committee to report on the Scots system of Legal Aid for the Poor (Cmd. 5435).

[2] Oxford, Slatters & Rose, Ltd., 1940.

[3] Preface to J. Mervyn Jones's *Free Legal Advice in England and Wales*.

citizen.[4] This ideal is already being translated into fact by such bodies as the Citizens' Advice Bureaux and the Command Legal Aid Sections (with their Unit Legal Advice Bureaux).[5] The former, as is well known, are to be found in many of our towns and cities and deal with the multitude of general and quasi-legal problems which affect the citizen in these times; the Bureaux are to a large extent manned by voluntary personnel but are grant-aided by the Government. The latter are the result of the experience of Commanding Officers who realised that the many domestic problems the serving man was called upon to face necessitated professional advice and in some cases special facilities for the rapid disposal of litigation. In the latter connection the Services Divorce Department of the Law Society has done excellent work.

The main deficiency of most agencies of free legal advice is that the facilities available for consummating the advice they give by the conduct of negotiations and by representation in Court are inadequate. Whilst the Poor Persons Rules 1926–1942[6] offer help in the High Court, the applications are so numerous that the unpaid professional help on which this scheme is based is too limited, particularly during the war, to deal with them. Paradoxically, no provision is made for free legal representation in the County Court[7] which is essentially the poor person's Court. Nor is any free legal assistance available in the domestic cases dealt with in the Police Court, though that jurisdiction is of increasing importance for the poorer classes.[8] In criminal cases heard in that Court the Poor Prisoner's Defence Act, 1930, provides some relief, but in practice the difference between the representation of the rich and poor persists.

Throughout these attempts to mitigate the existing injustices the unpaid help of the profession is normally the *sine qua non*, and while the present agencies of legal advice provide at least the nucleus of a modern system of Public Legal Aid, the arrangement for legal representation of the poor in Court is rudimentary and fortuitous.

The most recent suggestions have been made by the Haldane Society,[9] which proposes, *inter alia*, that a "Public Legal Service Department" should be created, to be managed by a committee on which lawyers and laymen should sit. The Department should establish Legal Advice Bureaux in the offices of every Local Authority which would give advice to any citizen on payment of a fee not to exceed 5s. If the Bureau certified that the applicant had a *prima facie* case and the Department were satisfied of his inability to litigate at the usual costs, the Department would be entitled to employ solicitors and counsel to conduct the case upon a reduced scale of charges, the applicant making such contribution as seemed appropriate. The funds of the Public Legal Service Department would be

[4] This experience has not been confined to this country; see E. J. Cohn, "Legal Aid for the Poor: A Study in Comparative Law and Legal Reform," 59 *L.Q.R.* (1943), 250, 359; A. H. Hassard-Short, "Legal Aid for the Poor," *Journ. of Comp. Leg.*, 3rd Series, 1941, Vol. XXIII, p. 27; John S. Bradway, "Legal Aid Work in the United States," *Journ. of Comp. Leg.*, 3rd Series, Vol. XXIV, 1942, p. 49

[5] Army Council Instruction 1398 of 1942 (4th July, 1942).

[6] R.S.C., O. XVI, rr. 22–31 H.

[7] Apart from two exceptional cases, viz. if a case commenced in the High Court under the Poor Persons Rules is remitted to the County Court, and in Workmen's Compensation Cases where no Court fees are chargeable.

[8] Legal aid may, however, be granted under the Summary Jurisdiction (Appeals) Act, 1933, when an appeal is brought from a decision of the Police Court.

[9] In a pamphlet published in June, 1942 called "The Law and Reconstruction."

provided out of the fees taken at Legal Advice Bureaux, contributions from applicants, costs recovered in successful litigation and, if necessary, a grant from the Treasury. It would be a statutory duty for members of the profession to undertake this work at the reduced scale of charges unless they could show good reason to the contrary.

While some of the proposals of the Haldane Society represent progress, others are open to grave objection. Thus, the Haldane Society proposals fail to recognise the place of Public Legal Aid in the general scheme of social security now under public examination. The suggestion that cases recommended by the Public Legal Service Department should be accepted by solicitors and counsel at a reduced scale of charges perpetuates the distinction between rich and poor, and is not in the interest of professional men who rightly may ask why public services of a professional character should be rated lower than services rendered to a private client. No provision is made for the recovery of costs against the Department when the other party is an ordinary client who would be in an inequitable position if he had to pay the Department's costs when losing but were unable to recover costs from the Department when winning his case against the Department's client. It would therefore seem that the future development of Public Legal Aid must be sought along lines other than those indicated by the Haldane Society.

II

The problem is that of relating Public Legal Aid to the general scheme of social security without undermining the present system of legal administration and without impairing the healthy principle of discouraging litigation. Two schools of thought are growing: the one regards legal difficulties of a personal nature as a disturbance of the social security of the individual and of similar consequence to illness and unemployment, and considers that any scheme of Public Legal Aid should be covered by the social insurance proposed in the Beveridge Report; the supporters of this view refer to certain instances of private insurance covering legal liability, such as solicitor's indemnity policies and third party risk policies. The other school proposes that the future arrangement of public legal aid should be developed from the existing free legal advice agencies and the Poor Persons Procedure, and suggests that a reform of these bodies on broad and uniform lines would satisfy modern needs. It is thought that the best solution lies somewhere between these extremes.

This is not the place to expound detailed plans; but it is suggested that a satisfactory system should be based on the following principles—

(1) It is the purpose of Public Legal Aid to tender legal assistance to every citizen *in his personal affairs*. No citizen should be unable to enforce or defend his legal rights through lack of funds.

It will be noted that Public Legal Aid would be available only for the personal legal affairs of the applicant. Disputes arising from commercial, industrial, agricultural or other occupational activity should be excluded from the benefit of the scheme. It is a normal risk attending to every type of occupational activity that legal disputes may arise in their course and that risk should be covered by the profits derived from the particular occupation.

No exact definition is required for the personal legal affairs of the applicant. It may be left to the Public Legal Aid authorities to develop and define that term in the light of experience. Some topics would appear

to be *prima facie* of a personal character; e.g. matrimonial causes, wills, disputes between landlord and tenant or building societies and purchasers about residential dwelling houses, personal injuries sustained by members of the family, hire purchase agreements concerning household chattels. In other instances, the classification will depend on the circumstances of the case. If e.g. the tenancy of a suburban shop is under consideration the answer may depend on the size of the tenant's business. If he is a small shopkeeper living in the proverbial room behind the shop it may well be that the dispute concerns his personal affairs which seem inextricably interwoven with his business affairs. If, on the other hand, the shop is rented by the owner of a chain of similar shops, the matter would clearly fall outside the scope of Legal Aid.

An express exception will have to be admitted for Workmen's Compensation cases which would follow the proposals of the Beveridge Report.

(2) It is evident that some kind of supreme authority will have to be established to administer Public Legal Aid. The control and development of this authority should be left to the legal profession. The Bentham Committee, which at present operates only in London, should extend its operation over the whole of England and Wales and should be re-constituted as the *Public Legal Aid Council*—a body composed of members of both branches of the profession. The Council which should be incorporated should be vested with certain statutory powers and should have jurisdiction over all agencies of Legal Aid in England and Wales.

It would be an undesirable development if the State assumed direct control over the agencies of Legal Aid, and if the Supreme Authority were linked up with a Government Department, e.g. the Lord Chancellor's Department or the proposed Ministry of Social Security. Such an arrangement would offend against the elementary principle that the administration of justice should be beyond the influence of the Executive, and would be contrary to the tradition of self-government which the legal profession has established in this country.

(3) It should be clearly realised that there exists a difference in principle between the two branches of Public Legal Aid, *viz.* legal advice to the poor and their representation in Court and in negotiations with other parties. While advice usually is required at a stage preliminary to the normal professional work, representation in contentious and non-contentious matters forms part and parcel of the normal activities of solicitor and counsel.

In the present growth of the agencies of legal advice we witness the repetition of the historical process which led to the emergence of the profession of solicitors in the fifteenth century. The practical work in which Citizens' and Army Advice Bureaux engage can hardly be recounted more aptly than in Professor Plunknett's[10] description of the origin of solicitors—

> "There remained numerous duties of a quasi-legal character which had to be done, and litigants soon found it convenient to have a sort of law agent who would set the complicated machinery in motion by engaging and conferring with the various branches of the profession as occasion required, and doing other duties, sometimes of a legal and sometimes of a business character."

[10] Theodore F. F. Plucknett, *A Concise History of the Common Law*, 2nd ed., London, 1936, p. 203; Edmund B. V. Christian, *A Short History of Solicitors*, p. 70.

While, therefore, with respect to advice the problem is to create an efficient organisation for that *tiers état* of the profession which is emerging, viz. the Legal Adviser, such an organisation exists already with respect to representation in contentious and non-contentious matters in the present two branches of the profession, and the problem is here to devise a machinery and procedure which places the services of the solicitor and counsel within the reach of those who are unable to find the usual fees and costs.

In short, while the problem of advice is one of organisation, representation in Court entails a problem of want which should and can be covered by social insurance. Consequently, while no means test should be required for the case of advice, such a test can hardly be dispensed with in the case of representation.

The task of the Public Legal Aid Council will, then, be twofold.

(A) The Council will have to set up a system of Public Legal Advice agencies in England and Wales. It is suggested that at every Local Security Office a *Public Legal Adviser* should be established. Where the amount of work justifies the employment of a whole-time official, a stipendiary should be appointed who, if required, may be assisted by voluntary helpers, and in other localities honorary Public Legal Advisers should be attached to the local Security Office. It should be a *sine qua non* for Public Legal Advisers that they are fully qualified members of either branch of the profession because it is desirable that they should be subject to the etiquette and disciplinary jurisdiction of the profession.

The Adviser should merely tender advice, and no representation in Court or in negotiations with third parties should be undertaken by him. A small fee would be payable for the advice which would be credited to the account of the Public Legal Aid Council.

The Council, through its *Advice Committee*, should co-ordinate and supervise the activities of the Advisers and issue rules designed to secure a uniform administration of their office. The present agencies of legal advice would be dissolved, but voluntary institutions—such as charitable, religious and trade union organisations—may continue their work subject to the supervision of the Council.

(B) With respect to litigation, the following procedure is suggested.

The Council should constitute a *Litigation Committee* which will have to decide whether legal representation should be granted in a particular lawsuit. If required, Litigation Committees may be set up by the Council in localities where Provincial Law Societies are established, but it is believed that a centralised system is preferable and that it would be a better solution to provide for several divisions of the Litigation Committee in London if work becomes too pressing.

Applications for legal representation will be prepared by local Public Legal Advisers or local solicitors. Applications should be fully documented and accompanied by a certificate of the local Security Office that the applicant is unable to find the costs of litigation at all or over and above a certain sum. If the Litigation Committee thinks that a *prima facie* case[11] has been established, it will issue a certificate of Public Legal Aid authorising the employment of a solicitor and, if required, counsel, and stating the conditions on which legal aid has been granted, i.e. that applicant has to provide a deposit or to find funds of a certain amount himself. The

[11] I.e. that applicant has shown a *causa probabilis*. On the criteria adopted in other countries see Cohn, *loc. cit.*, p. 362.

certificate would be sent to the Local Security Office, and the applicant would have to choose his own solicitor from a panel of solicitors who have declared their general willingness to accept instructions from clients supported by Public Legal Aid.[12] The Local Security Office would then forward the certificate to the solicitor and the case would be conducted like an ordinary case. This procedure would apply to all types of civil litigation in the Supreme Court of Judicature, the County Courts, domestic cases in the Police Courts, and before administrative tribunals. A similar procedure would be adopted in those non-contentious matters in which Public Legal Aid has been granted.

The certificate will normally state whether the solicitor is authorised to brief counsel. If the certificate does not provide for that contingency and the solicitor wishes to brief counsel, he would have to re-submit the matter to the Litigation Committee and ask for an extension of the grant of Public Legal Aid. This procedure would e.g. be followed when unforeseen difficulties arise in the course of the proceedings and the solicitor would consider it expedient in ordinary cases to act on counsel's advice. By this arrangement the Litigation Fund of the Public Legal Aid Council will be safeguarded against expenditure not authorised by the Litigation Committee.

After conclusion of the litigation the solicitor would present his bill to the *Taxing Committee* of the Public Legal Aid Council and would be paid his (and counsel's) fees and expenses at a scale representing the normal costs of representation in ordinary cases. With respect to the opponent's costs the Public Legal Aid Council would be deemed to have instructed the solicitor; if the poor client wins the Council would recover costs from the opponent, and if the poor client loses the Council would be liable to pay costs to the successful party.

For the financial purposes of the scheme the Council will have a *Litigation Fund* at its disposal. Costs recovered in successful cases, together with any fees paid for legal advice will be credited to the Fund and, if necessary, an annual allocation would be provided in the Social Security Budget. It is a matter of actuarial calculation whether the Social Security Fund can bear this additional burden without an increase in the contributions of the beneficiaries which, in the circumstances, would only be trifling. Apart from the administrative expenditure the financial risk involved is relatively small, as past experience shows that a high percentage of cases conducted under the Poor Persons Rules have been successful.[13]

It is believed that a scheme could be devised on these lines which would satisfy the urgent needs of the public and avoid the social injustices and professional sacrifices which characterise the present position.

C. M. Schmitthoff and John Terry.

[12] Solicitors on the panel would still retain their discretion to accept instructions in individual cases.

[13] In 1940 97 per cent of the cases were successful, C. W. Keeton, "Law Reform After the War," 58 *L.Q.R.*, 1942, pp. 247, 257; for 1943–44 a Treasury Grant of £11,000 has been allocated. *Annual Report of the Law Society for* 1942, p. 67.

PARLIAMENT

Ministerial Statements and Explanations

There has been some controversy over the proper method of placing ministerial policy before the House. In the past various methods of doing this have been used. Where it has been thought necessary to set out policy in some detail it has become usual in recent years to issue a White Paper, as in the case of the Government's proposals for educational legislation. Time is afterwards provided for a debate. This method has the advantage of giving members a good opportunity to master the points involved, and to prepare themselves for debate. It also provides a convenient means of placing the Government's policy before the public.

To move the adjournment of the House, which is an alternative method often used, is less satisfactory as the consequent debate is less likely to produce considered views, and is also apt to be limited by considerations of time. It could satisfactorily be used where the point involved is fairly clear cut, and the immediate reaction is all that is required.

A third method which has the sanction of long precedent is for the ministerial statement to be made at the end of questions, but it has of late met with some criticism. The objection to it was well put by Mr. Arthur Greenwood on 8th March, 1944, in the House of Commons (Official Reports for that date, col. 2058), when he said: "There is growing up a very strong feeling against a large number of ministerial statements being made at the end of Questions, not merely because such statements waste an amount of debating time, but because the House is not in a position, under its Rules, to debate the statement which has been made."

The occasion for this remark was the proposal of the Minister of Health (Mr. Willink) to make such a statement on the Government's housing policy for the immediate post-war period. This was objected to by Mr. Aneurin Bevan and other members, who took the view that this third method should only be used for "statements which it is in the public interest to hear at the earliest possible moment" (*ibid.*, col. 2054), which they contended that post-war housing policy was not. The Speaker ruled, however, that "a Minister may, at any time, make a statement" (*ibid.*). He also pointed out that after such a statement the House could always insist on a debate if it wanted. To which Lord Winterton replied that the previous Speaker had always on such occasions refused to accept a motion for the closure on the ground that it was not a matter of "definite and urgent public importance" (col. 2056). Mr. Maxton also took the point that in the absence of debate the Press might form an erroneous impression of the temper of the House and in this way considerable damage might be done in the country (*ibid.*, col. 2055).

A fourth method which is often used is for an arranged question to be asked. This may lead to something in the nature of a debate in the form of supplementaries, though that is not a desirable procedure. This method does not seem to have any very obvious advantage over that last mentioned, which can also be turned into something resembling a debate by a fire of questions as occurred in the present instance.

Ministerial Consultations with Outside Bodies

When the Minister of Health came to make his statement about post-war housing which gave rise to the discussion commented upon

above, he stated among other things that he "was informing local authorities of these decisions" (i.e. as to numbers of houses to be built and other matters) "to-day." This statement aroused further criticism on the ground that the Minister was informing local authorities of the steps which he proposed to take without having first discussed the matter in the House of Commons and obtained approval for the Government's policy (*ibid.*, col. 2061). It was further challenged that the Minister would be in consultation with local authorities before introducing legislation on the subject. He was asked indeed by Mr. Bowles to promise "that no undertaking entered into will in any way influence his decision in coming to the House," and replied that he would be mad "to enter into any such commitment" (*ibid.*, col. 2064).

There can be no doubt that this passage reflects a growing anxiety and bewilderment on the part of Parliament, and particularly of the House of Commons as to its position. The proud days when it could be said that Parliament could do anything except make a woman a man have long passed, and many members are beginning to wonder whether more than a small proportion of their theoretical powers are reflected in the reality of the situation. Like a lady of uncertain age who is becoming doubtful of the continued effect of her charms upon her lover, Parliament becomes querulous and exigent, but not very effective in its demands upon the executive.

There are perhaps two main points. Legislation, which it has long been for all practical purposes the prerogative of the executive to introduce into Parliament, is now becoming the prerogative of the executive to enact also, without immediate reference to Parliament, by means of Orders in Council, statutory rules, etc. This has been a burning topic for a long time, and the crisis of the war having passed it is being fanned to a white heat. It is a big subject and requires separate and extended treatment.

But even in making up its mind as to what the character of its legislation is to be the executive is becoming more and more independent of Parliament. Legislation is, of course, more and more specialist, and while there are in Parliament members who are experts in most of the matters dealt with, they represent general bodies of citizens grouped in constituencies and not occupational or other groupings which have their own representative bodies of experts. In these circumstances it is inevitable that Ministers should hold protracted consultations with the bodies representing those groups, or concerned with those aspects of life which are most affected by proposed legislation.

Thus the main lines of the Education Bill were laid down in a White Paper which represented negotiations between the President of the Board of Education and local authorities, religious bodies, employers and all sorts of interested parties. Parliament may and indeed has spent many weeks in detailed debate upon the clauses of the Bill, but it was largely shadow fighting, because everybody knew that few if any substantial amendments would be accepted by the Government. The only amendment involving any important principle, that of Mrs. Cazalet Keir relating to equal pay for equal work, which was carried against the Government, led to a minor crisis; but the Government restored the clause, and making the matter one of confidence, carried the clause which had been rejected in Committee on the third reading.

The vested interests involved in these negotiations may be very powerful. It is well known that the Minister of Health has been in

negotiation with the British Medical Association about the proposals for a national health service for many months. The White Paper which represents the outcome of these discussions suggests that on many matters the parties were not able to come to agreement. This must mean that the Minister of State has not been able to persuade the professional organisation to accept the policy which he and his official advisers deem to be necessary in the interests of the community.

It may be that Parliament will be brought into the controversy as a sort of umpire, if in the meantime the parties cannot arrive at an understanding. The Minister obviously feels himself in a much weaker position with the Medical Association, upon which he cannot turn the whips, than with Parliament, though naturally he would not admit it in public. This is reflected in the terms of the White Papers on Education and Health respectively. Having reached agreement with the bodies interested in education (except on one matter) the Minister presents definite proposals which eventually Parliament rubber stamps. But having failed to reach agreement with the doctors the Minister does not put his own proposals definitely before the country, or Parliament, but publishes a series of tentative or exploratory suggestions.

Even better examples could be furnished from the masses of war-time legislation enacted by means of Orders in Council. To take just one of these, we may mention the Fire Prevention Consultative Committee, which has been set up by the Minister of Home Security and which advises him in regard to the numerous orders imposing upon business firms the obligation to institute fire-watching arrangements, and upon the vast mass of the populace the obligation to do fire-guard duty. These orders certainly touch the average citizen more closely in his everyday life than almost any statute, and yet he has to rely for protection against the executive much more upon the trade union officials, employers' representatives, and other persons who constitute the Advisory Committee than upon the elected representatives in the House of Commons.

It seems therefore that the contest of power is in reality between the executive and the outside bodies representative of vested interests. In this struggle Parliament is represented by the executive, and eventually ratifies whatever arrangement the executive is able to arrive at. This does not mean that the struggle between legislative and executive has become completely illusory, but it means that it has lost a good deal of its reality.

R. S. T. C.

STATUTES

"Pay As You Earn"—The Income Tax (Employments, etc.) Acts, 1943 and 1944

The above Acts, together with the Income Tax (Employments) Regulations, 1944 (S.R. & O. 1944, No. 251), have effected a revolution in the system of charging and recovering tax due in respect of income arising from employments and offices. In short, the new system—popularly known as "Pay as you Earn"—provides that *each* payment of wages, salary or other remuneration, shall bear its appropriate charge of tax in such a way as to ensure that the aggregate tax deducted from the beginning

of the financial year to the time of current payment shall correspond, as near as may be, with the taxpayer's true liability for such period; if too much tax has been deducted in aggregate, an appropriate refund is made, with current pay, by the employer. The scheme became effective under both Acts as from the first payment of remuneration made after 5th April, 1944.

The 1943 Act applied this system only to remuneration paid weekly or monthly and not exceeding £600 p.a., but by sect. 1 of the 1944 Act, the new basis of assessing remuneration on the earnings of the *actual* year of charge—instead of, as heretofore, on the earnings of the *preceding* year —was extended to *all* emoluments chargeable under Schedule E of the Income Tax Acts, with the very important exception of pay, etc., arising from service in the armed forces of the Crown; this latter exclusion may have been due to reasons of morale, since, on promotion, tax will not be chargeable on the new rate of pay until the following year, and then only in part.

The statutory law contained in the two Acts only sketches in broadest outline the essentials of the new system, the full details of which are filled in by the Regulations. Before passing to these, we may note sect. 3 of the 1943 Act which provides for the discharge of so much of the 1943-44 tax as was not due for payment, under the old scheme, until after 5th April, 1944; this discharge, of course, involves a consequential reduction in that year's "Post War Credit" due under sect. 7, Finance Act, 1941. The change-over from the "preceding" to the "actual" year basis lends scope to the tax evader's notorious proclivities, since increases in emoluments for the year ended 5th April, 1944, would escape taxation insomuch as they cannot be charged, as heretofore, in the following year. To stop up this loop-hole, sect. 8 of the 1944 Act provides that all increases of remuneration granted after 20th September, 1943, shall be added to the normal 1943-44 assessment, but that the additional tax thereby due shall not be subject to the proportionate discharge referred to above; this section does not, however, apply to increases arising from the *normal* course of increments, promotion, etc.

The Regulations are very technical and set out in great detail the many requirements needed to make the scheme, outlined in the Acts of 1943 and 1944, work. Among the more important of these is the taxpayer's "Coding," which is the term used to denote the aggregate personal, child, and other allowances to which the taxpayer is entitled for the year of charge. This "Coding" is notified to the employer and is his authority to deduct—or refund in proper circumstances—the tax appropriate to the employee's earnings to date, according to statutory weekly or monthly "Tables" which are officially provided. In the event of unemployment the maturing refund is made either with the unemployment pay or direct by the Inland Revenue, at the taxpayer's option.

Part VI of the Regulations is especially noteworthy, since Reg. 42, authorised by sect. 2 (*d*) of the 1943 Act, removes the making of assessments under Schedule E from the General Commissioners of Income Tax, to whom it has been entrusted since the reimposition of the Income Tax in 1842, to the Inspector of Taxes subject, however, to the right of appeal to the Commissioners. It may not, perhaps, be fully appreciated that the deductions of tax, under "Pay as you Earn," from actual payments of remuneration are merely payments on account of the final liability for the year of charge which is based on the *earnings* for such year—under

the 1943 Act; if the tax deducted during the year is considerably less than the tax due on earnings—say, owing to belated payment of remuneration after the end of the year—the Inspector can require immediate payment of the balance of the tax instead of its adjustment in the "Coding" for a subsequent year (Reg. 46). Reg. 47 provides for direct assessment, and quarterly payments on account of tax, in respect of casual, and other special, employments.

The new system has only been working some three months but the general consensus of opinion seems to be that it is much fairer than the old one and that the direct relation of tax to current earnings is a real boon to the employed person.

A. FARNSWORTH.

NOTES OF CASES

Tort—Death—Survival of "Causes of Action"

A decision that the Law Reform (Miscellaneous Provisions) Act, 1934, which was aimed at abolishing the rule *actio personalis moritur cum persona*, does not enable a wife's claim for secured maintenance under s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, to survive the death of the respondent husband, may not seem to be of general interest; and that perhaps is why *Dipple* v. *Dipple*, [1942] P. 65, has received little attention. Actually, however, the case is of importance outside the law of divorce, because of the way in which Hodson, J., decided it. The learned judge held that the wife's claim for secured maintenance did not survive because, being a matter for the discretion of the Court, it was not a "cause of action" within s. 1 (1) of the Law Reform Act. If correct, the decision seems to mean that no discretionary remedy survives the death of a party under the Law Reform Act. For instance, a claim in divorce proceedings for the variation of a settlement would presumably not survive, just as it did not before the Act (see *Grant* v. *G.* (1862), 2 Sw. & Tr. 522; *Thomson* v. *T.*, [1896] P. 263, C.A.). Again, there would be no claim for costs if a party to litigation were to die before judgment, just as there was not before the Act (see *Coleman* v. *C.*, [1920] P. 71; *Schenck* v. *S.* (1908), 24 T.L.R. 739; cp. *Hodge* v. *Marsh*, [1936] 1 All E.R. 848, P.C.). Nor would there be a claim, in such circumstances, under the Law Reform (Married Women and Tortfeasors) Act, 1935, for contribution or indemnity against a joint or concurrent tortfeasor, nor under the Maritime Conventions Act, 1911, for apportioned damages in a case of contributory negligence; for all these are discretionary remedies. It is possible to put several other cases in which, if *Dipple* v. *Dipple* is correct, the Act of 1934 has failed of the remedial effect that was obviously intended by its draftsman.

With great respect it is submitted that the decision of Hodson, J., is not correct. In the first place, it puts too narrow a meaning upon the phrase "cause of action" as generally used; and secondly, it mistakes its meaning in the special context of s. 1 (1) of the Act of 1934.

For the general meaning of the phrase "cause of action" Hodson, J., relied upon a dictum of Lord Esher in *Read* v. *Brown* (1888), 22 Q.B.D. 128, where he defined it as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment

of the Court." The emphasis in Hodson, J.'s, mind seems to have been on the word "right" in this dictum; a married woman cannot be said to have a right to secured maintenance. Against this it may be pointed out, with respect, that this particular question (i.e. whether there can be a "cause of action" for a discretionary remedy) was not present to Lord Esher's mind when he framed the definition. Lord Esher was concentrating chiefly upon the adjective "every," as a reference to the case in which the dictum appears will show. Moreover there are other definitions of "cause of action" that do not require that the remedy sought should be due as of right. For instance, in *Jackson* v. *Spittall* (1870), L.R. 5 C.P. 542, at 551–2, the same learned judge (then Brett, J.) said that the popular meaning, and for many purposes the legal meaning, of "cause of action" is "the act on the part of the defendant which gives the plaintiff his *cause of complaint*" (italics mine). Finally, if "cause of action" really connotes that the remedy must be as of right, it follows that no discretionary remedy will be statute-barred in those cases (constituting the large majority) where the Limitation Act makes time run from the accrual of the cause of action, for if there is no cause of action there is no starting-point from which time can run. It would follow, for instance, that a claim for contribution against a joint or concurrent tortfeasor would never be statute-barred (notwithstanding that the authors of the leading work on the Limitation Act think that it can be: Preston and Newsom, *Limitation of Actions*, second edition, 52). This is too surprising a conclusion to be accepted with equanimity.

Still more serious is the objection to Hodson, J.'s, decision as an interpretation of the actual words of s. 1 (1) of the Act of 1934. It is submitted that in the special context of that sub-section the phrase "cause of action" does not bear its usual meaning. Its usual meaning, and its meaning in most of the earlier statutes upon which the decided cases turn, is "the facts giving rise to an action." (For these statutes and cases, see Halsbury, Hailsham ed., i, 8–9, para. 9; *English and Empire Digest*, i, 13–23; *Words and Phrases*, i, 403.) For instance, when it is said that time shall run from the accrual of a cause of action, it is reasonable to read this as meaning "from the happening of the *facts* that enable the action to be brought." This, therefore, is the meaning of the phrase "cause of action" in s. 1 (3) (*b*) of the Act of 1934, which imposes a period of limitation. Again, when it is said that a Court shall have jurisdiction only if the cause of action arises within a certain locality, it is reasonable to read this as a requirement that the *facts* enabling the action to be successfully brought should have happened in that locality. But this definition of "cause of action" as "facts" does not always fit. Thus when one speaks of the "joinder of causes of action," one is not speaking of the joinder of facts: one is speaking of uniting two claims in one proceeding. Similarly the rule against splitting causes of action refers not to the splitting of facts, but to the splitting of claims. So, too, with s. 1 (1) of the Act of 1934, which effects a survival of causes of action. It makes nonsense of this sub-section to say that it provides that the facts giving rise to an action shall survive the death of a party. Obviously it is not the facts that survive, it is the *action*. "Cause of action" here means "action," that is to say, the remedy or claim.

It may possibly be objected against me that it does not help on the actual facts of *Dipple* v. *Dipple* to say that an "action" survives although the relief is discretionary, because a divorce proceeding is not an "action"

(see *Re Binstead*, [1893] 1 Q.B. at 209, *per* Kay, L.J.), and, therefore, discretionary or not, it cannot survive. This seems to be the purport of a remark in Underhill's *Torts*, thirteenth edition, 48 n. (*e*). To this it may be replied that "cause of action" in the sub-section refers to any legal remedy, not merely to actions in the technical sense. That divorce proceedings are not ruled out as such seems to be shown by the sub-section itself, which declares that it does not apply to claims (i.e. in divorce) for damages for adultery, thereby implying that it does apply to other claims in divorce proceedings. If the draftsman thought that a claim for damages for adultery was not a cause of action, there was, strictly, no need for him to mention it. But it must be admitted that the sub-section speaks with a somewhat uncertain voice, for it avoids using the phrase "cause of action" in connection with such claims. Independently of the sub-section, there is respectable authority for using the phrase "cause of action" to express a claim for damages against an adulterer, notwithstanding that this claim is not made in an "action"; see *Brydges* v. *B.*, [1909] P. 187 at 192, *per* Farwell, L.J. Also, a claim that can be enforced only by arbitration is nevertheless a "cause of action" within the Limitation Act, 1939; see *Layen* v. *L.P.T.B.*, [1944] 1 All E.R. 432; the point is not expressly covered by s. 27 of the Limitation Act.

It may be added that there is another way in which the phrase "cause of action" in s. 1 (1) of the Act of 1943 is capable of giving trouble. The question may be stated in this way. Suppose that there is what may be called an incomplete cause of action before the death of one of the parties, and that facts occur after the death that would, but for the death, give a complete cause of action. Can it be said that there is a cause of action that survives the death under the sub-section? On the face of it the answer is no, for at the moment of the death all the vital facts have not occurred and there is no effective remedy; thus there is no complete "cause of action" to survive. Fortunately the question is not likely to arise often in practice, for two reasons. It is not likely to arise in contract, because actions in contract survived at common law and the help of the Act is not needed. And it is not likely to arise in tort, because the most likely case in tort is expressly cared for by s. 1 (4) of the Act. This sub-section provides in effect that where the defendant committed a wrongful act, not actionable *per se*, before his death, and the plaintiff suffered damage after the death, there is deemed to be a subsisting cause of action at the death. The fact that it was thought necessary to insert this sub-section reinforces the conclusion that, apart from it, the Court could not link together facts, some happening before the death and some after it, that in the aggregate constitute a cause of action. A situation in which the question may arise is in regard to costs, on the assumption that *Dipple* v. *Dipple* is wrongly decided. Suppose, for instance, that an action in tort is started against a tortfeasor before his death, and is continued to a successful conclusion after his death; can the Court order the tortfeasor's representatives to pay the plaintiff's costs incurred subsequently to the death? Assuming that the discretionary nature of the award of costs is not a fatal objection, the question is whether it can be said that there was a "cause of action" in respect of these costs before the death. It may be thought not. Clearly no Court will award a plaintiff costs that he has not incurred, and by hypothesis these costs had not been incurred before the death; therefore at the moment of the death there was no right to these particular costs and no remedy (not even a discretionary remedy) in respect

of them. On the other hand, it may be argued that the award of costs is an incident to an "action" that is allowed to survive by the Act, and therefore must be allowed to survive by implication.

Perhaps the upshot of all this is that it is time that lawyers (and in particular parliamentary draftsmen) agreed to use the phrase "cause of action" in one meaning only, and invented other phrases to express its other meanings. A tentative step was taken by Goddard, L.J., in *Draper* v. *Trist*, [1939] 3 All E.R. at 525, and again in *George Munro, Ltd.* v. *American Cuanamid Corp.*, [1944] 1 All E.R. at 389. The learned Lord Justice tried, as he put it, to analyse in his own mind "what exactly are the cause of action and the right of action, which are two different things. . . . In an action on the case, the cause of action is the wrongful act or default of the defendant. The right to bring the action depends on the happening of damage." This attempt to separate two different meanings is a step in the right direction, but it must be frankly recognised that it is a departure from existing usage. For the purpose of the limitation of actions in the case of torts not actionable *per se*, it is well settled that the cause of action is not the wrongful act or default but the happening of the damage—in other words, what Goddard, L.J., calls the right of action. Also, as applied to s. 1 (1) of the Act of 1934, Goddard, L.J.'s, idea of the nature of a cause of action would make s. 1 (4) unnecessary. This is not a criticism of Goddard, L.J.'s, suggestion; it is simply an indication of the mess we are in.

GLANVILLE WILLIAMS.

Quasi-contract—Action Against Third Hand

Transvaal Investment Co. v. *Atkinson*, [1944] 1 All E.R. 579, raises a broad point of principle in the law of quasi-contract. If A pays money to B, in such circumstances that he can successfully sue B in quasi-contract, and B pays the money over to C, who takes it in good faith, can A successfully sue C in quasi-contract? The answer on principle would seem to be no, unless of course B was acting as agent for A or C, in which case B would be a mere conduit-pipe and the payment would in law be a payment by A to C. In any other circumstances it seems plain on principle that A cannot get a personal judgment against C in quasi-contract; his proper remedy against C is the proprietary one of "following" the money into the hands of C, assuming that such following is possible on the facts of the particular case.

The decision of Atkinson, J., in the instant case seems to bear out this view. B, an employee of the A Co., fraudulently obtained cheques belonging to and drawn by the A Co., and paid them into the bank account of his wife C. He told his wife that the cheques represented commission paid to him by the A Co., and C acted in this belief and with perfect innocence. In accordance with B's instructions C paid him out half the moneys so paid in to her account, and spent the other half on herself and on housekeeping. When the A Co. discovered B's fraud there was nothing in C's account, so that there was no question of following. Could the A Co. nevertheless obtain judgment against C as for (1) money paid under a mistake of fact, or (2) money received to their use? Atkinson, J., held not. "It may be difficult," he said, "to regard the payments as money paid by the plaintiffs to the defendant, whether under a mistake of fact or at all. The plaintiffs never consciously paid the defendant anything; the defendant

never consciously received anything from the plaintiffs. Indeed, I doubt whether strictly she received anything from them. What happened was that her husband stole certain signed cheques, and forged them by making false alterations, and instructed the bank to receive and deal with the proceeds. The bank had no authority from the defendant to receive anything on her behalf, nor had the plaintiffs any authority to pay anything to the National Provincial Bank for her account or on her behalf." This passage may seem at first sight a little difficult to understand, for presumably there was a transfer from the plaintiffs' bank account to the credit of the defendant's bank account, and the transfer was surely with the defendant's authority (she knew of it, she knew that the cheques came from the plaintiffs, and she dealt with the account). What the learned judge perhaps meant was this, that if the A Co. pays coins to B under a mistake of fact, and B pays them to C who takes them in good faith (not necessarily for value), the A Co. cannot sue C in quasi-contract, because they have made no payment to C; and the position is the same where B instead of getting coins from the A Co. gets a cheque. This seems to be the thought in the later passage in the judgment where, after quoting *Sinclair* v. *Brougham*, [1914] A.C. 398, the learned judge said: "If A steals a £5 note from me and gives it to his wife, asking and receiving £2 10s. by way of change, and instructing her to spend the rest in paying a coal bill, and buying herself a pair of shoes, those she was wearing being full of holes, even the law could not imply a promise by the wife to repay me my £5 note. There is no privity on which to found such a promise." Those who dislike the implied-promise theory of quasi-contract may object to the wording of this passage, but they need not object to the substance of it.

Anxious to please all points of view, Atkinson, J., went on "to deal with the case on the view held by Lord Wright, that the real basis of law in such an action as this is that of an unjust enrichment at the plaintiffs' expense unintended by them." He held that, assuming this to be the true principle, it had no application here, for the reason that "where the money has been received by an agent for a principal he cannot be sued for its return if before notice he has paid it away to his principal or on his principal's instructions." Even as regards the part of the money spent by the wife on herself, she was merely acting as her husband's agent because he was bound to provide for her (p. 586 B).

With respect, it is submitted that this way of deciding the case was not free from difficulties. It is true that where A pays money to C, C acting expressly as agent for B, and C pays it over to B, C's payment to B takes away any quasi-contractual action that A would otherwise have had against C. But this has been held not to apply where the payment by A to C was not intended by A as a payment to an agent; see *Newall* v. *Tomlinson* (1871), L.R. 6 C.P. 405, which, though unsatisfactory, has not been overruled; cp. Keener, *Quasi-Contracts* (1926 reprint), 61; Woodward, *Quasi-Contracts* (1913), 43. In the instant case, if there were any payment by the A Co. to the wife C, it was certainly not intended to be a payment to her as her husband's agent. It is therefore submitted that the simpler ground of the decision was that stated above, that an action in quasi-contract does not lie against the third hand, at any rate where the third hand receives in good faith. The proper remedy against the third hand is the proprietary remedy based upon the legal and equitable doctrines of "following." The only difficulty in the instant case was in determining whether or not the wife was a third hand. From the point of view of the

cheque, the piece of paper, she was; but from the point of view of the credit and money that she obtained from her bank, she was only the second hand. The decision follows ordinary business notions in regarding the cheque as representing money, and consequently in regarding the wife as the third hand.

A dictum that seems to attach a proprietary effect to the action in quasi-contract is that of Lord Sumner in *A.-G.* v. *De Keyser's Hotel*, [1920] A.C. at 556, which has been given prominence by being repeated in Chalmer's *Sale of Goods*. "If the servant of a company," said Lord Sumner, "acting *ultra vires* of the company converts a stranger's chattel, and, having sold it, pays the proceeds into the company's account as its servant, I suppose an action for conversion would lie against the servant, and for money had and received against the company." If this means that both actions could be brought, it is respectfully submitted that it is wrong; for by suing the servant in conversion the plaintiff would elect not to waive the tort, and in that event he cannot claim the proceeds of the sale even from the servant, much less from the servant's master or from a third party. If, on the other hand, the dictum means that the plaintiff could, without suing the servant, sue the company for money had and received, it is submitted that it is correct only if the tort were committed in the course of the servant's employment, so that the conversion was that of the company as well as of the servant. Otherwise the result would be to allow an action in quasi-contract against the third hand, which, as has already been submitted, would be against principle.

It may be added that in the instant case no claim was made against the wife for conversion of the cheques. Had the claim been made it might have raised an awkward problem, for it is arguable that the wife, although innocent, was a joint tortfeasor with her husband. This line of argument would also be apt in a case like that envisaged by the learned judge in his "pair of shoes" dictum, quoted above. If A steals my £5 note the property in the note remains in me, and if A proceeds to give the note to his wife the property still remains in me, unless his wife takes the note in good faith and for value. If therefore the wife spends the note while it is still my property, she seems to be liable to me in conversion. But perhaps if the wife gave her husband £2 10s. for the note, this would be sufficient value to pass the property in it to her.

It may also be added that no claim was made against the wife on the footing of constructive trust. Probably, on the facts, B became a constructive trustee for the A Co. of their cheques and of any money received by him thereunder (see *John* v. *Dodwell & Co.*, [1918] A.C.563). But his wife was not accountable as a constructive trustee, because she knew nothing of the breach of duty committed by B in making the transfer to her (*ibid.* at p. 569; *Williams-Ashman* v. *Price*, [1942] Ch. 219).

GLANVILLE WILLIAMS.

Contract—Exceptions Clauses—Measure of Damages

An exceptions clause in a contract, like any other clause, may be so vaguely worded as to vitiate the whole contract on the ground of uncertainty. This happened in *Bishop & Baxter* v. *Anglo-Eastern Trading & Industrial Co.*, 1944 1 K.B. 12, C.A., where an agreement for the sale of goods was expressed to be made "subject to war clause." There being no established form of war clause, the contract failed altogether.

Two other decisions on exceptions clauses, already noted in this Review, have now been affirmed by the Court of Appeal and House of Lords respectively: *Bontex Knitting Works* v. *St. John's Garage* (*ante*, Vol. 7, p. 75) (1944), 60 T.L.R. 253, [1944] 1 All E.R. 481; *Egham & Staines Electricity Co.* v. *Egham U.D.C.* (*ante*, Vol. 6, p. 160), [1944] 1 All E.R. 107. The difficulties felt with the former decision by the writer of the note were not shared by the Court of Appeal, which affirmed the decision in a very brief judgment. The exceptions clause, said Scott, L.J., was "only effective while the contract was being carried out according to its terms."

Leavey v. *Hirst*, [1944] 1 K.B. 24, is of interest on the measure of damages in a contract of sale of goods. Section 51 (3) of the Sale of Goods Act provides that "where there is an available market for the goods in question the measure of damages [for non-delivery of the goods] is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver." What if there is no available market? The answer given by the Court of Appeal in the above case was that, on the facts of that case, the buyer was entitled to recover as damages the loss of the profit that he could have made by making up the goods (cloth) into overcoats and selling them, if the contract had been carried out. "In other cases," said Lord Greene, M.R., "in other circumstances, this particular method might not be appropriate; but, in my opinion, in this case it was appropriate," ([1943] 2 All E.R. at 585 H).

GLANVILLE WILLIAMS.

The Innkeeper's Lien

Whether an hotel proprietor acquired possession of chattels belonging to his guest as luggage, in his capacity as innkeeper, or as pledgee to secure payment of his bill, proved the determining factor in *Marsh* v. *Commissioner of Police* and *Another* (*McGee*), [1944] 1 K.B. 99.

One Nall, having run up a bill of over £66 during five days stay at the Ritz Hotel, handed over a valuable diamond ring by way of security. Nall had obtained possession of this ring from the Goldsmith and Silversmiths' Company by means amounting to larceny, of which offence he had been convicted. The present proceedings arose under the Police (Property) Act, 1897, to determine whether Marsh, on behalf of the Company, could recover the ring without paying the sum for which it had been pledged as claimed by McGee, on behalf of the Ritz Hotel.

A Divisional Court held Marsh was entitled to the ring without any such payment, on the ground that the pledger can confer no better title than he himself has, i.e. that of a thief, but found it necessary to define and distinguish the scope of the Innkeeper's Lien as this would have operated even against the true owner. Viscount Caldecote, L.C.J., at p. 101, stated the law thus: "An innkeeper is given a lien on the luggage of the guest which the guest brings with him to the inn and which the innkeeper receives as such." This privilege is doubtless the counterpart of the innkeeper's common law liability to insure the safety of his guests' goods, reviewed recently by the House of Lords in *Shacklock* v. *Ethorpe*, [1939] 3 All E.R. 372. The lien extends beyond luggage in its ordinary connotation. Thus including a piano or motor car brought to the hotel by the guest. It could not cover this ring, the possession of which was transferred to the hotel expressly by way of security, i.e. as a pledge.

Had this ring been obtained by false pretences, the result of this case would have been otherwise, since a voidable title would have enured to the protection of the pledgee as was held by the Court of Appeal in *London Jewellers* v. *Attenborough*, [1934] 2 K.B. 206, where the swindler's signature to a sale on approval note by way of receipt was held conclusive evidence that a power of disposition over the property had been transferred to such swindler within the principle of *Kirkham* v. *Attenborough*, [1897] 1 Q.B. 201.

Though the decision in the instant case is unquestionably well based in authority, it must be accounted amongst the vagaries of our jurisprudence that the innkeeper's economic interest in the protection of his bill by a "real security" depends for its efficacy (*a*) on an ancient anomaly, i.e. the common law lien, rather than the expressed intentions of the parties, and (*b*) on whether a stranger (here the Goldsmith and Silversmith Company's agent) was tricked into parting with the possession, with or without any intention of passing the property or right of disposition over it, an anachronism adversely criticised by Mr. C. J. Hamson: "The Effect of a Secret Fraudulent Intent," 51 L.Q.R, 653.

T. H. Tylor.

An Alarming Extension of Nuisance.

Owing to the complexities of modern life a vast extension has taken place in the past few decades of liability without fault. This is evidenced in Criminal Law by the imposition of absolute statutory prohibition of many acts from the mere doing of which *mens rea* is inferred; and in Civil Law by the extension of strict liability beyond the old rule in *Rylands* v. *Fletcher* to other circumstances creating an abnormal risk, and by an ever-widening application of vicarious liability. In these circumstances a novel extension of liability irrespective of fault calls for special consideration and careful examination.

In the recent case of *Ware* v. *Garston Haulage Co., Ltd.*, [1944] 1 K.B. 30, the plaintiff's son collided on his motor cycle at night with the rear of a trailer and lorry, the rear light of which was extinguished. He died two days later from his injuries. The lorry had broken down at 10 a.m. that morning. The driver parked it on the near side of the highway and a mechanic came out from Nottingham and removed the back axle of the lorry for repairs. At 5.35 the lights of lorry and trailer were put on. At 7.20 the driver and his mate set off to obtain four hurricane lamps from a police station three-quarters of a mile distant. The rear lamp of the lorry was alight when they left, but was noticed to be out by several witnesses between that time and 7.30 when the mechanic returned with the axle, to find the plaintiff's son and motor cycle under the trailer. There was some evidence that the lighting on the trailer was known to have been faulty. On the above facts Lewis, J., found negligence on the part of the company's servants and awarded the plaintiff £400 under Lord Campbell's Fatal Accidents Act, 1846, and £339 8s. 9d. under the Law Reform (Miscellaneous Provisions) Act, 1934. The defendants appealed. The Court of Appeal, consisting of Scott, MacKinnon and Goddard, L.JJ., dismissed the appeal. They left open the question of negligence and decided the case on the simple ground that this unlighted obstruction amounted to a dangerous nuisance casting an absolute duty on the defendants' servants to prevent injury resulting therefrom to users of the highway. Only Scott, L.J., delivered a judgment and no authority was cited. He summed up their Lordships' conclusion thus (at p. 31): "The plaintiff is entitled to hold

his (her?) judgment on the ground that the facts, as proved, show that there was a nuisance. There was a dangerous obstruction in the highway and consequently an absolute duty on the defendants to light it or otherwise efficiently guard it to prevent accidents. It is no answer for the defendants to say that the light on the trailer had gone out after they had left the vehicles to go to the police station to procure hurricane lamps." Earlier in his judgment the learned Lord Justice said (at p. 31): "If anything is placed on the highway which is likely to cause an accident through being an obstruction to those who are using the highway on their lawful occasions (such as a vehicle unlighted and unguarded standing there at night) and an accident results, there is an actionable nuisance." With all respect it is submitted that to describe this lorry, in the above circumstances, as "placed" is somewhat misleading, and to hold that the duty to safeguard the public is "absolute" on these facts, in the absence of any negligence on the part of the defendants, places an intolerable burden on the users of the highway, themselves the victims of misfortune. It is not suggested that the decision of Lewis, J., in negligence in the court below could not have been sustained. The case was pleaded in negligence and there would seem to have been ample evidence to support this. That the result of such negligence was a public nuisance causing special damage to the plaintiff's son is also admitted. It is, however, proposed to examine the *ratio decidendi* of the Court of Appeal on the basis of no fault on the part of the defendant or their servants, their liability being "absolute" or "strict." It is as though a car collided at night with a street refuge (through a skid or burst tyre), stunning its occupants and extinguishing its lights. It will be convenient to examine this proposition under three heads: (*a*) an obstruction; (*b*) an unlighted obstruction; and (*c*) an unlighted and therefore dangerous obstruction.

(*a*) *An Obstruction.* As is well established, the highway is dedicated to the use of the public for the purpose of passing and re-passing and certain other normal activities, and a somewhat special relationship exists both as between co-users *inter se* and between them and the adjacent occupiers. This "freedom of the road" has involved a modification in responsibility. In cases of trespass it is well recognised that adjacent landowners must protect their property from injury through the normal use of the highway where no negligence is proved: *Tillett* v. *Ward* (1882), 10 Q.B.D. 17, and *Goodwyn* v. *Cheveley* (1859), 4 H. & N. 631, with which may be compared Lord Blackburn's judgment in *River Wear Commissioners* v. *Adamson* (1876), 2 App. Cas. 743. The converse has recently been illustrated by *Hughes* v. *Williams*, [1943] 1 K.B. 574 (C.A.). (See Mr. Glanville William's learned but critical note in Mod. L. R., Vol. 7, p. 77.) The modification of the law of trespass as between co-users of the highway necessitating proof that the trespasser (to the person) has failed to exercise the care of a reasonable man has been exhaustively treated in "Trespass and Negligence," Vol. 49, *Law Quarterly Review*, p. 359, by Professors Goodhart and Winfield, their conclusion being that users take the risk of accidents other than those due to negligence.

It would be strange if such an amelioration in the strict liability for trespass had no counterpart in our law of nuisance, and it would seem to follow *a fortiori* that a mere obstruction of our right of way, necessitating proof of special damage, should involve no higher liability. That this is so would seem clear, not only on principle, but also on authority. As Salmond's learned Editor remarks at p. 292 of the ninth edition, speaking

of nuisance: "The law relating to the user of highways is in truth the law of give and take." Art. 483 of Halsbury's *Laws of England*, Vol. 16, p. 354, reads: "It is a nuisance at common law either to neglect any legal duty in respect of a highway, or to hinder or prevent the public from passing freely, safely and conveniently along it, unless such prevention or hindrance is justifiable as an exercise of rights reserved by the dedicating owner, or as an ordinary and reasonable exercise of the rights of a passenger or frontager thereon, or under statutory powers." Whether the parking of the lorry pending repairs was an ordinary and reasonable exercise of the rights of a passenger is a question of fact to which one might anticipate an affirmative answer. As Sir George Jessel suggested *obiter* in *Original Hartlepool Collieries Co.* v. *Gibb* (1877), 5 Ch.D. at 721: "It would be clearly reasonable, for instance, if a wheel came off an omnibus in the middle of a highway, for a blacksmith to be sent for to put the wheel on the omnibus if that were the easiest mode of moving it out of the way, and the omnibus might lawfully stop there until the wheel was put on in order to take it out of the way, if that were the best mode of taking it out of the way, and a reasonable and usual mode." A clear statement of the principles involved is to be found in *Harper* v. *Haden & Sons, Ltd.*, [1933] 1 Ch. 298, where scaffolding used in the normal repair of a house caused an obstruction, and Lawrence, L.J., at p. 308 said: "As a general rule such an obstruction is wrongful and constitutes a public nuisance, unless it is negligible in point of time or authorised by Parliament or occasioned in the reasonable and lawful user of the highway as a highway." And Romer, L.J., at p. 317: "He has merely a right to use it subject to the reasonable user of others, and if that reasonable user causes him to be obstructed he has no legal cause of complaint." It followed that the plaintiff had no legal redress.[1]

(*b*) *An Unlighted Obstruction.* A considerable number of cases involving unlighted obstructions are reported, but none would appear authority for the imposition of so strict or absolute a liability as that here imposed by the Court of Appeal. The clearest exposition is to be found in *Penny* v. *Wimbledon U.D.C.*, [1899] 2 Q.B. 72, where the plaintiff fell over an unlighted heap of earth and the defendant was held liable for the negligence of their independent contractors in failing to exercise reasonable care in safeguarding the public. So in *The Snark*, [1900] P. 105, a shipowner was made liable for the failure of his independent contractor to use reasonable care in lighting a wreck in "that highway The River Thames," as his agents continued occupation, though maritime law would have permitted its abandonment without further liability. In these and other similar cases the employer's duty may be crystalised as Langton, J., neatly phrased it in *The Pass of Ballater*, [1942] P. at 117, speaking of the use of dangerous chattels: "He has not merely a duty to take care but a duty to provide that care is taken." The common feature in all the authorities is that there must have been negligence proved against the servants or independent contractors employed where co-users of the highway were involved. Moreover, unlighted lorries are no strangers to our Courts as is seen from *Tart* v. *Chitty*, [1933] 2 K.B. 453, *Baker* v. *Longhurst*, *ib.* 461, and *Tidy* v. *Battman*, [1934] 1 K.B. 319, the two last being decisions of the Court of Appeal; and it is significant that all three, and cases cited

[1] It is not without significance that some sixty odd acts, found to be nuisances, are instanced on pp. 355–63 of the second edition of Halsbury's *Laws of England*, Vol. 16, none of which would cover the facts of the instant case.

therein, were argued (as those *supra*) in negligence. The argument, moreover, that this was to admit of the plea of contributory negligence is inadmissible as this was also held a defence to an action for private injury due to public nuisance in the old case of *Butterfield* v. *Forrester* (1809), 11 East. 60, though its precise operation is to render the special damage too remote, as was pointed out by Lord Atkin in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. at p. 730, i.e. the plaintiff's injury was due to his carelessness rather than to the defendant's nuisance in leaving the pole across the highway.

(*c*) *An Unlighted and therefore Dangerous Obstruction.* Does the epithet "dangerous" extend liability beyond seeing that reasonable care is taken? Even were the rule in *Rylands* v. *Fletcher* directly in point, it is now settled law that a non-natural use is necessary; see the judgment of Lord Wright in *Collingwood* v. *Home & Colonial Stores*, [1936] 3 All E.R. at p. 202, and "Dangerous Things and the Non-Natural User of Land," by Dr. Stallybrass, *Cambridge Law Journal*, Vol. III, p. 376. The argument that a motor van was a "*Rylands* v. *Fletcher* chattel" was rejected in *Phillips* v. *Britannia Hygienic Laundry Co., Ltd.*, [1923] 2 K.B. 832, as was the contention that a skidding motor bus was a nuisance for which a passenger might recover in *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652; see especially per Fletcher Moulton, L.J., at p. 666. It seems strange that a broken down lorry, even though unlighted, should impose a higher liability than a dangerous chattel. In *Pope* v. *Fraser* and *Southern Rolling and Wire Mills* (1939), 55 T.L.R. 324, where sulphuric acid spilled from a cracked carboy along the highway without the knowledge of the defendants' lorry driver and the plaintiff skidded in it and was burned, Humphreys, J., held the defendant liable because after knowledge of this nuisance had reached his servant, the latter did nothing either to abate the nuisance or prevent the accident. Were *Ware's* case to be considered as the "continuance" of a nuisance within the principle of *Sedleigh-Denfield* v. *O'Callagan*, [1940] A.C. 880, it would still be necessary to show that the lorry driver ought to have known that the light was out, a finding unlikely on the supposed facts and certainly not the *ratio decidendi* of the Court of Appeal.

The inescapable conclusion seems to be that a responsibility, transcending that to see that care is taken, is imposed on a normal user of the highway, himself victim of misfortune, without any authority, and that such an extension of the sphere of absolute liability deserved a more elaborate argument and judgments than are reported. It is a matter for regret that the findings on negligence in the lower court are likely to preclude further enlightment.

T. H. Tylor.

Culture and Charity

The Englishman likes to take his culture, in so far as he likes to take it at all, seriously. It can only be associated with a small—and superior—section of the community, and should accordingly be very definitely dissociated from any element of entertainment. Some outstanding features of English life have always been difficult to fit into this conception, for example, Shakespeare. However, Shakespeare has been got over in a typically ingenious, possibly, hypocritical, way. The really cultured people read Shakespeare, or pretend to do so; they do not go to see his works

acted. In this way they avoid being entertained, and so can continue to respect themselves.

For many decades the Royal Choral Society provided at a continuous financial loss choral music for the cultured, and also for some of those who enjoy music. As long as they stuck to Bach, Handel, and Beethoven they were all right, and continued to lose their money in a normal, cultural, and satisfactory way. In 1937, however, they became almost mezzobrow and produced *Hiawatha* which produced a nice profit. So nice that it attracted the attention of the Inland Revenue who contended that this profit in turn should attract income tax.

The answer to this was that the Society which had been "established to form and maintain a choir in order to promote the practice and performance of choral works" was a charity, and that "the whole of its income was applied solely towards the promotion of the Society's objects." The Special Commissioners found as a fact that the Society was not "established for charitable purposes only," and that tax must be paid.

When the case (*Royal Choral Society* v. *Commissioners of Inland Revenue*, [1943], 2 All E.R. 101) eventually reached the Court of Appeal the main arguments put up by the Solicitor-General in support of the tax authority were: (*a*) that the question of charity or not is one of fact, and that the Special Commissioners had decided this point in his favour; and (*b*) that in any event the Society was not a charitable institution, since its work was not educational, having an entertainment value.

With regard to (*a*) there was in *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society*, [1928] 1 K.B. 611, an incautious statement to that effect by Lord Hanworth, M.R., which Lord Greene, M.R., had no difficulty in disposing of (p. 103).

With regard to the second point, the Court of Appeal took a wide view of "charity" under its educational head. Education does not necessarily involve "teaching in the sense of a master teaching a class"; its objects may be attained in indirect ways especially in connection with aesthetic education, and the fact that people derive pleasure or entertainment from a work certainly does not mean that it must not be regarded as educative.

The judgment of Lord Greene, M.R., will well repay study not only as a forceful and lucid exposition of the legal position, but for width of culture in its approach to the subject.

He "protested against that narrow conception of education" put forward by the Solicitor-General. In his opinion "a body of persons established for the purpose of raising the artistic taste of the country and established by an appropriate document which confines them to that purpose is established for educational purposes, because the education of artistic feeling is one of the most important things in the development of a civilised human being."

R. S. T. C.

Trading with the Enemy

The two decisions of the Court of Appeal in *Stockholms Enskilda Bank* v. *Schering Ltd.*, [1941] 1 K.B. 424, and [1943] 2 All E.R. 486, involve several points of both difficulty and importance and therefore deserve close analysis.

The facts can be summarised shortly. In 1936 a German company

became indebted to the Swedish bank in the sum of £84,000. By a contract, governed by English law, Schering Ltd., an English company, undertook as principal to pay part of that debt, viz. £50,400, by certain instalments extending over a period of eight years in consideration whereof the Swedish bank was to assign to the English company, on the occasion of each payment of an instalment, a like amount of the Swedish bank's claim against the German company. If the instalments were duly paid, the total amount receivable by the Swedish bank from the German company was to be reduced to £50,400, but if default was made by the English company in acquiring an instalment of the debt at the due date, the debt of the German company was to remain at such amount as was proportionate to a total of £84,000. In simplified figures (which are not quite in conformity with those mentioned in the agreement) this meant that any payment of £6050 per annum by the English company would result in the assignment to it of a claim for a like amount against the German company, and in the discharge of that company to the extent of £10,500, while in the event of default the respective instalment due by the German company in any year would revert to £10,500. The English company also provided a substantial security for the performance of its obligations, which originally consisted of goods pledged to the Swedish company and was later converted into cash.

1. In the first action the Swedish bank claimed from the English company payment of one instalment which fell due in October, 1939. The defence was that payment was prohibited under s. 1 of the Trading with the Enemy Act, 1939, since it would involve a dealing and, more particularly, a payment "for the benefit of an enemy," viz. the German company. Sir Wilfred Greene, M.R., with whom MacKinnon and du Parcq, L.JJ., concurred, had no difficulty in upholding this plea. If the Swedish bank received payment from the English company, this would enure to the benefit of the German company, because, firstly, it would lead to preserving "for the German company the substantial benefit of the discount, a benefit which it loses if no payment is made," and, secondly, "the German company, by payment, would be relieved of its obligation to the appellants (i.e. the Swedish bank) *pro tanto*" (p. 438); in the latter connection the Master of the Rolls pointed out that, though, on payment to the Swedish company, the English company would acquire a claim for a corresponding amount against the German company, this claim could not be enforced during the war and that, therefore, it was an advantage to the German company to have an English rather than a Swedish creditor.

This reasoning is unanswerable, and the only comment that is required relates to two incidental points touched upon in the judgment of Sir Wilfred Greene, M.R.

(*a*) The Swedish bank relied upon the decision of Macnaghten, J., in *R. & A. Kohnstamm Ltd.* v. *Ludwig Krumm* (*London*) *Ltd.*, [1940] 2 K.B. 359. This was the simple case of a British surety who had guaranteed to a British creditor of a German firm the payment of the debt due by the latter. Although the grounds on which the learned judge gave judgment against the British surety are perhaps not too easy to follow, it is submitted with respect that the result reached by him was unquestionably right. The British surety was not asked to discharge an obligation "of any enemy" within the meaning of s. 1 of the Trading with the Enemy Act, 1939, but his own obligation the performance of which did not involve a dealing, or payment, "for the benefit of an enemy," since in the absence of special

circumstances (such as a situation permitting a set-off) it makes no difference to the enemy whether he is indebted to his original British creditor or to the British surety who, on paying the creditor, acquires the claim by way of subrogation.

The great reserve with which, in the present case, the learned Master of the Rolls treated Macnaghten, J.'s, decision, should not be understood as throwing doubt upon it.

(*b*) The Swedish bank also said that even if it was not entitled to payment, it was at any rate entitled to a judgment which would declare and settle its rights. It argued that the only thing prohibited by the Act was payment and that, provided no payment was made, no offence would be committed. The Court of Appeal, however, held that "the plea of the statute was a defence to the action and that, once it was established, the action should be dismissed" (p. 441).

The practical significance of this point extends beyond the realm of the Trading with the Enemy Act. Thus the Defence (Finance) Regulations contain numerous provisions prohibiting payments to non-residents without licence. It does not seem to be the practice of non-resident plaintiffs who bring actions in the English Courts for the recovery of money, to obtain the Bank of England's licence prior to the institution of proceedings and to plead affirmatively its existence. Nor has any defendant apparently pleaded illegality of payment under the Defence (Finance) Regulations. The point has been dealt with somewhat cursorily in *Ginsberg* v. *Canadian Pacific Steamship Co. Ltd.*, 66 (1940), Ll.L.R. 206, at p. 232, but although it was referred to in 3 (1940), MOD. L. R. 211, not even Mr. Howard's book on the Defence (Finance) Regulations seems to allude to it. The decision of the Court of Appeal in the case of *Schering Ltd.* (No. 1) may be understood as establishing that in the circumstances indicated above the plea of illegality would succeed, although no doubt the defect could in many cases be cured by obtaining a licence and, if necessary, amending the statement of claim.

2. In the second *Schering Ltd.* case the English company claimed a declaration that on the outbreak of war its contract with the Swedish company had become contrary to public policy and unenforceable. The substantial point involved, therefore, was to define the circumstances in which a contract between a British subject (in the territorial sense) and a neutral (in the territorial sense) is void under the common law rules relating to trading with the enemy. Lord Greene, M.R., Lord Clauson and du Parcq, L.J., reversing the decision of Simonds, J., held that, though the operation of such a contract would be suspended, it became abrogated only if the continued existence of the contractual relations between the British subject and the neutral tended in fact to increase the resources of the enemy. In the instant case the Court held that there was a mere possibility or suspicion of a benefit accruing to the enemy from the continued existence of the contract, as opposed to its suspension. The combined result of the two decisions of the Court of Appeal, therefore, is that, while payment to the Swedish company was held to be beneficial to the enemy and, consequently, illegal, the continued existence of the contract was not so beneficial to the enemy as to require its abrogation rather than suspension.

The difference of opinion which arose between the Court of Appeal and Simonds, J., is one not of principle, but of degree. It is neither possible nor necessary to embark upon a detailed review of the factual circumstances

which caused Lord Greene to conceive that there was no real danger of the enemy benefiting from the continued existence of the contract. It must suffice to say, with great respect, that the broad view taken by Simonds, J., has much to commend itself, and is perhaps more attractive than Lord Greene's reliance upon a close analysis of the facts of the individual case before him. There is a good deal of judicial support for Sir Arnold D. McNair's suggestion that the test is not whether performance of a particular contract would be mischievous, but whether the contract belongs to a mischievous category (see *Transactions of the Grotius Society*, vol. 27 (1942), pp. 182 *sqq.*, 184). The same learned writer is one of the few who have given attention to the effect of war upon contracts with neutrals (see *ibidem* p. 212 and *Journal of Comparative Legislation*, XXIV (1942), 20). The tenor of his weighty observations would suggest that the second judgment of the Court of Appeal will not meet with his approval. It must be remembered that, as a matter of principle, suspension is only in exceptional cases the effect of the outbreak of war upon contracts (see McNair, *Grotius Society*, *l.c.* p. 196; 56 (1940), L.Q.R. 197). As Lord Dunedin said in *Metropolitan Water Board* v. *Dick Kerr & Co.*, [1918] A.C. 119, at p. 128, "pre-war contracts which involve intercourse with the enemy (whether a party is an enemy or not) are completely destroyed and not merely suspended. The reason is that in the eye of the law the duration of a war is permanent." Moreover, though everybody will share Lord Greene's reluctance to stigmatise a perfectly legitimate pre-war transaction with a neutral trader as illegal, there is perhaps something to be said for the bold proposition that a neutral trader who in a particular case is concerned in a transaction "for the benefit" of an enemy, is for the purposes of such transaction in the same position as if he himself were an enemy. Such a rule would by no means be irreconcilable with the tendency and spirit of the available case law. Indeed, the rigour of public policy is such that remote possibilities, so emphatically rejected as a test by Lord Greene, have often been considered by the highest judicial authorities as material to the formulation of the common law rules relating to contracts with enemies. When, speaking of such transactions, Lord Dunedin put their unlawfulness on the ground that "contract in general might enhance the resources of the enemy or cripple those of the subjects of the King" (*Ertel Bieber & Co.* v. *Rio Tinto*, [1918] A.C. 260, 273), was he envisaging only likely, as opposed to possible, consequences? The rule that an enemy cannot sue during war-time in British Courts, is no less derived from public policy (see Lord Wright in *Sovfracht* v. *Van Udens*, [1943] A.C. 203, 233, 234). When the House of Lords applied that rule to a person in enemy-occupied territory, no effect was given to the argument that the plaintiff could have no benefit from the judgment since the sum recovered could not be remitted abroad. "The asset would be created, though it necessarily remained here till the end of the war. Such an asset might well operate as security for an advantage to the enemy from a neutral lender" (*per* Viscount Simon L.C. at p. 212). Was this not merely one of those matters of pure speculation, of suspicion and vague possibility which Lord Greene refused to take into account?

3. The English company's alternative argument in the second case of *Schering Ltd.*, was that, since payments were indefinitely "suspended," postponement of performance would make the contract as performed something radically different from the contract as expressed and that, consequently, under an implied term it had to be considered as impossible

of performance, discharged or "frustrated." The English company, therefore, invoked the doctrine of *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404, and *Bank Line* v. *Arthur Capel & Co.*, [1919] A.C. 435, rather than of *Metropolitan Water Board* v. *Dick Kerr & Co.*, [1918] A.C. 119.

Lord Greene said that all that was in question was the payment of money and the assignment of that part of the debt which remained unassigned, and found it impossible to suggest that the parties, if they had thought of the events which happened, would have agreed that the contract should be at an end. This conclusion is indeed appropriate to the peculiar character of monetary obligations in connection with which suspension rather than discharge should be more widely recognised than has been done in the past; see Mann, *The Legal Aspect of Money* (1938), pp. 271, 272.

The English company's argument assumed that payments were in fact "suspended." It would be deprived of its basis, if it should appear that this was not so.

4. This brings us to the question why, in the second case, the English company raised the issue of the abrogation of the contract.

One reason is obvious. If the English company had succeeded, as it did before Simonds, J., the security put up by it under the contract for the performance of its obligations would have been released. But would the company also have been relieved of the liability to pay the further instalments due under the contract?

S. 1 (i) of the Trading with the Enemy (Custodian) Order, 1939, provides that "any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy" shall be paid to the Custodian whose receipt, under s. 3 (iv), is a good discharge. Does this provision apply to payments due under a contract which comes to an end owing to supervenient illegality or which is discharged owing to impossibility of performance or frustration? If the answer is in the affirmative, the practical effects of the common law rules of abrogation would to a large extent be excluded by statutory provisions. Mr. Howard in his book on *Trading with the Enemy* (Butterworth, 1943, p. 68) thinks that "some clearer words than these are necessary to revoke a well-established rule of the common law," and that the enumeration of various kinds of debts in s. 1 (ii) none of which seem to be payments under executory contracts of the kind that are abrogated, suggests a restrictive interpretation. This argument overlooks that s. 1 (ii) is introduced by the words "without prejudice to the generality of the foregoing paragraph," the wording of which as reproduced above is as clear and wide as possible. In fact it is such as to suggest the conclusion, strange though it may be, that moneys payable under a contract which upon the outbreak of war became void or was discharged, remain payable to the Custodian.

An authoritative pronouncement on this important point would be highly desirable, and would have been necessary in the second decision of the Court of Appeal in the case of *Schering Ltd.* As has been mentioned above, the English company's alternative argument was based on the assumption that payments were suspended and postponed during the war. If, whatever the fate of the contract as a whole was, payments had to be made to the Custodian, they would have operated as a full discharge as against the Swedish company, since the contract between that company and the English company was expressly stated to be subject to English law. On the other hand, if the English company paid to the Custodian,

it became entitled to call for the assignment of a due proportion of the Swedish company's claim against the German company.

The above submissions, however, are perhaps at variance with an inference which may be drawn from the judgment of Simonds, J., in *Re Gourju*, [1943] Ch. 24. By his will the testator directed his trustees to hold the income of his residuary estate upon the statutory protective trusts for his widow who, on the 10th July, 1940, resided at Nice. On that date, by an Order made under the Trading with the Enemy Act, the whole of metropolitan France became enemy territory so that the widow became an enemy. The question before the Court was whether the coming into force of the Order was an event whereby the widow was deprived of the right to receive the income. The Court's answer was in the affirmative, and it was decided that as from 10th July, 1940, the income was held on certain discretionary trusts the objects of which were the widow, her surviving son and the children of a deceased son. In view of the peremptory wording of s. 1 (i) of the Trading with the Enemy (Custodian) Order it would have been possible to argue that, although *under the will* the widow's interest determined, because the income was money which would, but for the existence of a state of war, be payable to an enemy, and was therefore payable to the Custodian, yet *under the Act and the Order* such money was payable to the Custodian and would not fall into the discretionary trust. The Solicitor-General who appeared for the Custodian, argued that the widow's interest had not determined. But there was no discussion of the question whether, even if the widow's interest came to an end, the overriding effect of the Order was not such as to require payment to the Custodian of what would have been paid to the widow had she not been an enemy. If the Act and the Order said: "Any money which is payable to . . . an enemy," no problem could arise, and it would be clear that the Custodian could never be entitled to more than the enemy himself. But the legislature's words are: "Any money which would, but for the existence of a state of war, be payable to . . . an enemy"; they seem to confer upon the Custodian greater statutory rights than the enemy would have under the general law.

In conclusion it may be mentioned that Vaisey, J., held in *Re Wittke*, [1944] 1 All E.R. 383, that if enemies are the objects of the discretionary trust arising on the determination of a protective trust within the meaning of s. 33 of the Trustee Act, 1925, money applicable for their benefit is to be considered as money which, but for the war, would be payable to them and must therefore be paid to the Custodian.

F. A. Mann.

Patent Application — Manner of New Manufacture — A.R.P. Measures

The decision of the Patents Appeal Tribunal (Mr. Justice Morton) "in the matter of an application for a Patent by G. E. C." (*Reports of Patent Cases*, Vol. 60 (1943), p. 1), deals with an application for a patent covering a fire extinguishing medium and a method for extinguishing incendiary bombs. The application filed on 5th July, 1940, originally contained ten claims. The first five claims were allowed by the Patent Office and are contained in British Patent 543,142 granted to the applicant in February, 1942; of these claims I and V are of interest; they read as follows—

"I. An extinguisher for application on incendiary bombs and the

like, comprising solid zinc chloride in a container which will resist the corrosive action of the zinc chloride and protect it from the effect of atmospheric moisture and which is adapted when placed on the seat of the fire to deposit such zinc chloride on the burning metal in a substantially undissipated form to produce a smothering flux and thereby extinguish such metal."

"V. The manufacture of a fire extinguishing medium for incendiary bombs and the like by forming an aqueous solution of zinc chloride and ammonium chloride adapted for use in an ordinary stirrup pump, the proportions being such as result from adding up to as much ammonium chloride as possible to an aqueous solution of zinc chloride containing upwards of 50 per cent by weight of zinc chloride."

The remaining five claims were refused by the Patent Office and, on appeal, by the Patents Appeal Tribunal; of these claims VI and X are of interest; they read as follows—

"VI. The manufacture of a fire extinguishing medium for incendiary bombs and the like by forming an aqueous solution of zinc chloride adapted for use in an ordinary stirrup pump, the concentration of which lies between 55 per cent by weight of zinc chloride to 45 per cent of water and 75 per cent of zinc chloride to 25 per cent of water."

"X. The method of extinguishing incendiary bombs and the like by applying thereto a highly concentrated aqueous solution of zinc and ammonium chlorides so as to form a smothering flux on the burning metal and thereby extinguish such metal."

The solutions of zinc and ammonium chloride referred to in the claims had been published in the *International Critical Tables* before 5th July, 1940; on that date, however, it was not known that these solutions had properties rendering them useful for the purpose of fire fighting.

On behalf of the applicant it was argued that claim VI should be allowed in view of the particularisation of the novel effect of the solution; this argument was rejected by the Patent Office and the Appeal Tribunal on the strength of a decision by Lord Maugham in I.G. Farbenindustrie's Patent (47 R.P.C., p. 322), and a series of earlier authorities in which it was definitely decided that "no man can have a patent merely for ascertaining the properties of a known substance." The decision on claim VI does not call for comment.

The decision regarding claim X settles a point of patent law on which there had been several earlier conflicting judgments. The Statute of Monopolies of 1623 authorises the grant of patents to the true and first inventor of "any manner of new manufacture," and according to Sections 1 and 93 of the Patents and Designs Act, 1907 to 1942, a patent can be granted only for an invention which constitutes a manner of new "manufacture." There are numerous decisions refusing patent applications on the ground that the invention did not constitute a manner of new manufacture, for example an application covering a new indexing system, an application covering a new system of musical notation, an application covering a new arrangement of buoys having different colours and emitting

different sounds for navigation purposes, an application covering a new system for colouring chemicals for identification purposes, and an application covering a new method for extracting lead from the human body. From these decisions the Patent Office drew the conclusion that a method or system is not patentable "unless it results in some tangible vendible product," and accordingly refused claim X. This view was attacked by counsel for the applicant, who quoted decisions allowing a patent for preventing corrosion in steam boilers by introduction of metallic zinc, a patent for chemically cleaning dirty linen and other borderline cases. In endeavouring to reconcile the authorities Mr. Justice Morton formulated the following rule: "A method or process is a manner of manufacture if it (*a*) results in the production of some vendible product or (*b*) improves or restores to its former condition a vendible product or (*c*) has the effect of preserving from deterioration some vendible product to which it is applied." Mr. Justice Morton explained that he was not attempting to lay down a hard and fast rule or to exclude the possibility that methods not covered by the rule, brought to his attention hereafter, might constitute a manner of new manufacture. Applying this rule to claim X the Tribunal held that the invention claimed therein did not constitute a manner of new manufacture and confirmed the decision of the Patent Office. Since the applicant merely suggested the use of a known substance for the purpose of extinguishing incendiary bombs at a time when the need for dealing with such bombs first arose in July, 1940, the decision appears not only consistent with the precedents but also equitable. It is, however, gratifying to note that Mr. Justice Morton does not exclude the possibility that methods not falling strictly within the three categories of his rule might in future be held to constitute a patentable manner of new manufacture. Certainly it is not the function of the patent system to protect principles, ideas, systems or methods in general; however, if an inventor devises a new method of carrying out a process of a truly technical nature, such as for example quickly and safely demolishing an old building, he may well deserve patent protection, even if there remains no vendible product.

The decision refusing a monopoly for the fire extinguishing medium covered by claim VI or the method of extinguishing incendiary bombs covered by claim X, appears right because it is against the public interest that any person should have a monopoly for a product or method applicable to fire fighting or A.R.P. measures. This point, however, was not in issue in the case decided by the Tribunal and—as the law stands—it would not have been a ground for refusing the patent or restricting the monopoly if the applicant had been able to show that his claims covered a manner of new manufacture. On the contrary, claim I covering a fire extinguisher, and claim V covering the manufacture of a fire extinguishing medium, were accepted by the Patent Office and are contained in the grant of British patent 543,142 so that the patentee has a monopoly for them. Under Section 29 of the Patent Act a Government department or any contractor authorised in writing by a Government department may use the invention covered by patent 543,142 for the services of the Crown, subject to compensation payable to the patentee. Under the existing law, a manufacturer who has not secured an order or an authority from a Government department is, however, not entitled to manufacture and sell to the public an extinguisher or an extinguishing medium covered by claims I and V. It is submitted that the British patent law needs altering in this respect; while the grant of patent 543,142 provides no argument for a comprehensive

system of compulsory licences embracing all kinds of patents, it shows that, in the public interest, anybody should be entitled to use, against payment of a reasonable royalty, patents affecting national defence, public safety or public health. Recommendations for changing the U.S.A. patent law in this way are contained in the report of the U.S.A. National Patent Planning Commission of 18th June, 1943.

P. MEINHARDT.

REVIEWS

HOW TO REFORM PARLIAMENT. By ROBERT S. W. POLLARD. The Forum Press. **2s.** pp. 48.

That political coma was characteristic of the inter-war period is now almost a commonplace. To utter such a suggestion ten years ago was to invite derision. Fashions in political outlook, as in other things, change, and it may be hoped that the moment has arrived for indicating once more what is needed to make Parliament into an efficient machine of government. Mr. Pollard does this in short compass and with admirable clarity. It is to be hoped that a public increasingly conscious that the working of the machinery of government needs radical overhaul will take advantage of the useful summary of what is required, so far as the internal organisation of Parliament is concerned, which Mr. Pollard provides.

At the end of the last war there was this awareness. It was expressed in the Conference on Devolution Report, in the classic but unimplemented Machinery of Government Report produced by the Haldane Committee, and elsewhere. Debate continued in the 'twenties. Ten year ago Dr. Jennings published his study of Parliamentary Reform. Nothing has happened in this generation of inaction if not reaction. Now is the time to show what does need to be done, and if this means inevitably a recapitulation of arguments and recommendations often made before, that is the fault of the reactionary and not of the reformer.

Undoubtedly the most important of the improvements urged is that specialisation of the House of Commons into committees for the several functions of the modern state of which Mr. Pollard too is in favour, as have been most commentators on the Constitution since the Haldane Committee made the recommendation in 1918. A Defence Committee and a Foreign Affairs Committee might have done much to secure a greater unity behind a more consistent policy, to educate the House, to keep the Government in harmony with opinion and opinion in harmony with facts rather than wishful interpretations. A Colonial Empire Committee should not have been incapable of awakening both Commons and Ministry to the needs and potentialities of our territories as these begin to be seen now under the stress of war.

It is certain that the real urgency of the need for such reforms of Parliamentary organisation and procedure has not yet been understood. At such a time as this, when much is likely to be in the melting-pot, Mr. Pollard makes an opportune contribution. True, the reforms are of detail rather than at the roots of our institutions, but they are many; and added together they would present to us a very much more efficient Parliamentary system. Anyone truly anxious for that objective can be recommended to investigate the means of achieving it in the pages of this essay and in the bibliography with which it concludes. Nor need it be forgotten that

the traditional way of our achieving major constitutional changes is by what might to many an observer appear no more than minor improvements. How minor in this sense was even the historic reform of 1832 and yet how fraught with consequences.

H. R. G. GREAVES.

HANDBOOK OF ADMIRALTY LAW. By GUSTAVUS H. ROBINSON. pp. xiii and 1025 (with index). 1939. West Publishing Co., St. Paul, Minn., U.S.A.

We are glad to welcome to the excellent Hornbook Series a textbook on the American law of Admiralty. Broadly speaking, the U.S.A. Courts of Admiralty possess the same jurisdiction as their opposite number in this country and it is both instructive and interesting to an English lawyer to peruse an elementary general textbook of this character. This is particularly so as we have no similar work—a serious lacuna in the field of English legal writing which it is to be hoped will soon be made good.

The topics covered by Professor Robinson are history, constitutional position of the Courts, torts in Admiralty, workmen's compensation, wrongful death, the Admiralty contract, contracts for arbitration, proper law and immunity, the seaman, jurisdiction *in rem* and the maritime lien, the common carrier by water, water carriage under charter, towage, pilotage, salvage, general average collision, and limitation of liability.

Divergencies in the general maritime laws of our two countries have naturally grown up during the past two centuries, and the statutory additions to the law have accentuated this process. These are not, however, of fundamental importance, which is not perhaps a matter of surprise when one considers how necessary it is to secure as much uniformity as possible in the various maritime codes. Indeed, I think that Professor Robinson is apt to make too much of such differences as do in fact exist. In connection with the important subject of maritime liens he regards the divergence between the two systems as being "considerable," being under the impression that in England the maritime lien gives rise to a personal obligation on the part of the owner of the *res*: an obligation which it is true usually comes into existence, but only as a result of the owner appearing to the process and giving bail under the Admiralty Courts Act and not by virtue of the maritime lien itself.

Professor Robinson is gifted with lucidity of exposition; he has a firm grasp of a wide and intractable subject; and is to be congratulated on an admirable pioneer effort in this field of the law.

R. S. T. C.

LAW REFORM (FRUSTRATED CONTRACTS) ACT, 1943. By GLANVILLE L. WILLIAMS. pp. viii and 92 (with index). London, 1944. Stevens & Sons, Ltd. **7s. 6d.** net.

Readers of Dr. Williams's excellent note on this Act in 7 MOD. L. R. 62, with its parting indication of "the considerable number of legal problems" which it raises, and of his other contributions[1] to the elucidation of a particularly difficult branch of the law of contract, that relating to impossibility of performance, cannot have failed to hope that a fuller discussion of the provisions of the new Act would come from his pen. Here it is—and it will be an exacting critic who is not well pleased.

[1] See 6 MOD. L. R. 46, 5 MOD. L. R. 1, and 4 MOD. L. R. 241.

The scheme of the book is much the same as that of the note mentioned above. Dr. Williams very sensibly resists the temptation to produce a dissertation on the law of frustration, but provides an introductory chapter on "the Genesis of the Act" in which he discusses the three decisions *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651, the *Fibrosa Case*, [1943] A.C. 32, and *Whincup* v. *Hughes* (1871), L.R. 6 C.P. 78, and refers to some of the principal cases in each of these three divisions. Despite the difficulties in which we get involved on any close analysis of the speeches in the *Fibrosa Case* few will deny that it does help to remove the inelegancies which have clustered round the law of quasi contract, and it may be that Dr. Williams's contributions to the subject have not been without their effect.

In the remainder of his book Dr. Williams discusses the new Act section by section, line by line, almost word by word. Bringing to his tabie the well informed scholarship and the power of analysis which characterise all his work he is able to provide the profession with a series of invaluable notes which are likely to prove most useful in practice. No one who is called upon to advise a client within the comparatively narrow field which the Act covers will dare to neglect the opinions which are expressed here, even if in the end he does not accept them all.

There are a number of points of acute difficulty arising out of the Act which may, indeed probably will, lead to litigation. From the Statute of Frauds onwards attempts to redress or improve the common law by statute have almost invariably resulted in pretty conundrums of construction, and often in a cloud of troublesome, indeed repellent, decisions which provide grist for the mills of the do nothing schools.

The problem of drafting effective amending statements presents certain features of its own to which too little attention has been given. It is extraordinarily difficult for a busy draughtsman, even if he has the benefit of some outside advice, to forecast all the implications and repercussions of his work. A statute of this kind ought to be subjected to long scrutiny and analysis by the profession before being passed into law. The sort of discussion which takes place in this book ought to occur before and not after the bill comes before Parliament, which is a body clearly not fitted to apply the necessary testing out.

The proposals for this particular bill were communicated to Chambers of Commerce by the Lord Chancellor in advance of its introduction, a procedure in line with present-day legislative methods. It would be only one more step to make the exact terms of proposed legislation known to the legal profession in time to obtain their views. After all, the profession will have the job of administering the statute, and its views are at least as worthy of consideration as those of chambers of commerce. Perhaps the Lord Chancellor, who is forward looking in these matters, and to whose initiative the present statute is believed to be due, will be good enough to consider this proposal.

Turning to some of the more important matters in respect of which Dr. Williams shows that difficulties may arise, I will mention the following.

(*a*) The Act applies in terms only to "contracts governed by English law." This, possibly intended to exclude Scotch contracts, Dr. Williams regards as a "juristic blunder," mainly on the ground that the law of frustration is largely a matter of quasi contract. One may doubt whether in practise the Courts will have much difficulty in holding that contract includes quasi contract.

(*b*) The Act deals with the position of parties who have "been discharged from the further performance of the contract." But since it is concerned with cases of prepayment, and the prepayment is often of the whole consideration, there will in many cases not be any question of "further performance." Are we then to hold that the draftsman has failed to hit at all a large proportion of the contracts at which the Act is ostensibly aimed? Dr. Williams boldly advises that the Court should read the words as if they included cases where the party would have been discharged had he not already performed, and one can only hope that the judges will be equally bold, or the resultant situation will be ludicrous.

(*c*) The Act gives statutory form to the *Fibrosa Case* (*supra*), i.e. it enables repayment to be claimed of money paid in advance on a contract which has been frustrated, so that there has been a total failure of consideration. But does the subsection (1 (2)) go farther and cover cases of partial failure of consideration? This is a very important point and one on which the wording is far from clear. Dr. Williams gives some, if not very convincing, reasons for advocating the wider view which one would like to think is more in conformity with the spirit of the Act.

(*d*) Dr. Williams raises a question as to how far the Act goes in providing for the recovery of the expenses to which a party has been put in the performance of a frustrated contract. He thinks that this goes so far as to permit recoupment of half the loss of profits. He agrees that this is contrary to the proposals of the Law Revision Committee, and for once we seem to have a case where the author is allowing his own conception of what is just to run away with the logic of his analysis. In any case it is a little difficult on the score of justice to see why the other party to a frustrated contract should have to provide half the first party's loss of profit.

(*e*) Sect. 1 (3), which gives the Court power to make a party who has reaped benefits under a frustrated contract pay for them, "creates a new and important kind of quasi-contractual liability in English law," viz. that resulting from unjust enrichment, and brings us more nearly into line with some continental systems. At the same time it leaves the Court without guidance as to lines on which to assess the value of the benefit except by the very vaguest phrases. Dr. Williams analyses the position with skill and makes valuable suggestions. There are some exceedingly difficult problems here, especially under the almost phenomenally vague wording of paragraph (*b*) of the subsection.

Every one of the contracts excepted from the scope of the Act by sect. 2 (5) meets with strong, and well-directed criticism. Dr. Williams shows that in excepting advance freight under charter parties, advance premiums under insurance policies, and advance payment under contracts for the sale of specific goods on the ground of unwillingness to interfere with established commercial usage the legislature has not only perpetuated anomalies which commercial lawyers have long been anxious to remove, but has probably brought into existence a number of new ones which are likely to give rise to injustices of the very type which the statute was designed to remedy.

If there is a weakness in this excellent volume it is that no attempt is made to fit this particular development in our law of contract into the recent historical field. It is only a part of an important movement to remove rigidities which had grown up under a too logical development of the common law by conferring upon the Courts much wider powers to

adjust the contractual liability of the parties to the justice of the situation. It should accordingly be placed in its right position against the background of such statutes as the Hire Purchase Act, 1938.

R. S. T. C.

PRINCIPLES OF PRIVATE INTERNATIONAL LAW. By ARTHUR NUSSBAUM. Oxford University Press, 1943. pp. xvi and 228. Price **$3.50.** In England **£1** (Sir Humphrey Milford).

This book is divided into three parts. The first is headed "Private International Law in General," and treats on sixty-six pages such matters as the object and name of private international law; the main phases of its history; internationalist and nationalist theories and currents; legislation and treaties; and literature. The second part, comprising 115 pages, is devoted to the "choice-of-law rule" and deals with qualification, renvoi, the preliminary question, public policy, evasion, domicil and nationality, form, and contracts. Under the title of "Procedural Questions" the third part of seventy-nine pages includes a discussion of the distinction between substance and procedure; of jurisdiction; foreign phases of the proceedings; foreign judgments; and proof of foreign law. All these matters are discussed with special reference to American law, but against a civil law background.

It would be strange, if a work by so distinguished and versatile an author did not make many sound and interesting points or contain numerous valuable observations on questions of private international law which are still without a final answer. The author's critical attitude towards the Restatement is particularly welcome.

Yet there will probably be a number of readers who will part from the book with a feeling of disappointment. To a large extent this may be due to the author's eclecticism, indeed his arbitrariness in selecting both the material on which he relies (some important books are not even mentioned), and the topics which he discusses. Why, e.g., should the law of contracts be discussed in a book on "Principles," while marriage, torts or administration of estates are omitted? Perhaps it is primarily the title that is unfortunate. Large sections of the book are based on various articles published by the author in recent years in American periodicals. If the book had been called *Collected Essays* its sketchy character would perhaps have been less evident and more readily forgivable.

The programme of the book is explained in the Introduction as follows: "Generally, a more realistic approach to Private International Law is intended, an approach which also requires the occasional use of psychological, political and other non-legal data or explanations. However, as the title and the size of the volume indicate, no exhaustive discussion will be undertaken." This is a programme which is both attractive and ambitious. But it may be doubted whether it has been carried out. Professor Nussbaum dislikes precision of expression and fine distinctions or, as he says, "conceptualism." He prefers broad, sometimes even sweeping, statements which he supports by an appeal to common sense rather than to legal evaluation. To choose an example at random, attention may be drawn to the paragraph dealing with the recognition of foreign judicial decisions in non-contentious matters such as adoption, probate of a will, etc. All that the author says (p. 235) is that "it is reasonable to give such decrees liberal recognition provided they are not open to special objections —a view corroborated by comparative inquiry." Another point which

may have some illustrative value and in connexion with which a little more "conceptualism" (as well as a more careful perusal of judicial authorities and other material) might have led to greater clarity and better results, is the author's view of the restrictions imposed upon the parties' freedom to choose the law governing their contract. Professor Nussbaum accepts the theory "that parties contracting in a given territory must not disobey prohibitions set up by the law of that territory lest their contract be void" (p. 159). But he attributes to that theory a somewhat unexpected aspect (p. 178): "In this volume the liberty of the parties in choosing their law is conceived as bounded by prohibitions originating in the law of the place of contracting." Does the author envisage prohibitions affecting the choice of law or prohibitions interfering with the substance of the contract? In the latter event, does he refer to prohibitions relating to the conclusion of the contract or to its performance? It is no wonder that, as a footnote remarks, "a proper-law-of-the-contract theory, thus limited, was not contemplated by Lorenzen and other critics of that theory."

The circle of students who will benefit from the book and can use it without risk will not be great. But in so far as it finds its way into the hands of the experienced reader, it will serve as a helpful supplement.

F. A. Mann.

CRIME AND PSYCHOLOGY. By Claud Mullins. Methuen & Co., Ltd., London. xvi and 234 pp. 1943. **8s. 6d.** net.

The great success of this book, which has already reached its third impression, is well-deserved. Even if it were nothing but a convincing plea for the application of psychological methods in the treatment of law-breakers and an able discussion of the techniques to be employed by criminal courts, it should be made compulsory reading for anyone who has to play some part in the administration of criminal justice. In fact, however, the author uses his main topic merely as a platform from which to put forward a number of valuable suggestions for the reform of English criminal procedure—suggestions which future reformers may do well to bear in mind.

Mr. Mullins's plea for the wider use of psychology is preceded by a chapter on the "Principles of Modern Psychology," which, though no new discoveries in this field can in fairness be expected from a layman, will be useful as an introduction to the psychology of crime for the general public and for the lawyer who has not made a special study of it. In another chapter a number of cases from the author's practical court work are used as illustrations, mostly cases of young men charged with sexual offences. Lacking personal experience of juvenile court work the author refrains from dealing with its special problems, such as in particular its relation to the Child Guidance Clinic. Although the number of cases suitable for psychological treatment which come to the notice of one magistrate in the course of the brief period of five years is necessarily limited, it has proved large enough to enable the author to work out a technique and to form certain views as to future possibilities. These views are expressed most clearly in his criticism of the Ease-de Hubert Report on the subject, published in 1939, to which the second chapter of the book is largely devoted. Whereas the human material for that semi-official Report consisted exclusively of inmates of various prisons and Borstal

institutions who had been sent to Wormwood Scrubs for psychological treatment, the author urges that, wherever possible, such treatment should be applied to offenders at large in connection with a probation order. He strongly objects to the line taken in the Report that psycho-therapy on probation should be confined largely to first offenders and comparatively minor offences. The present reviewer is inclined to concede that psychological treatment, as a rule, stands a better chance of success when applied to an offender who is not forced to lead the unnatural life characteristic of an institution, who can support himself and who feels that he is trusted. Moreover, bad as institutional life is for most offenders, the dangers it implies for sexually abnormal types are too glaring to need any further discussion. On the other hand, it has to be admitted (and is not disputed by the author) that, according to the present state of public opinion, sentences of imprisonment or Borstal will remain inevitable for serious crimes, which means that provision has to be made for psychological treatment in institutions. It is to be welcomed, therefore, that those pre-war experiments at Wormwood Scrubs have recently been revived.

As a corollary to his preference for combining psycho-therapy with probation Mr. Mullins suggests that the law of probation should be tightened up so as to enable the court to inflict some actual punishment in connection with a probation order. The Probation of Offenders Act of 1907 was, he thinks, drafted by officials whose principal interests lay in juvenile delinquency; therefore the excessive leniency which probation implies in English law. This point which has frequently been discussed in recent years, is bound to remain controversial. Mr. Mullins's opponents might argue, for instance, that, although already under the present law very irksome conditions can be attached to a probation order, courts are often reluctant to use this power because they realise that guidance on the part of a wise probation officer may be more constructive than compulsion. If this question should be taken up in connection with a new Criminal Justice Bill it might be worth while to collect some information from countries which, as some States of the U.S.A. do, use the Continental form of suspended sentence side by side with the English form of probation. Moreover, the author's interesting suggestion that "many who would not be charged as things are, but who need assistance and who may be dangerous to others," might one day be brought under the jurisdiction of the court in order to receive supervision and treatment (p. 166), has also to some extent been put into practice in Massachusetts and a few other States where anyone charged with crime may be placed on probation without any finding of guilt.

Obviously, it is impossible for a lawyer when dealing with the psychological aspects of crime to avoid a discussion of the McNaughten Rules. Interesting as Mr. Mullins's attitude towards these Rules is, this is one of the very few points where the present reviewer feels unable to agree with him. This refers not so much to the view expressed on p. 32 that "the criminal law cannot except determinist dogmas; if it did, all reform of criminal law and procedure would be totally irrelevant"; this is contradicted by the author himself on p. 33, where he rightly admits that "in practice it matters nothing whether the determinist view is right or wrong." Our opposition is directed against his thesis that, bad as the McNaughten Rules are, there would be no point in altering them, because "it is adjective law, not substantive law that needs to be reformed,

namely, procedure at and after trial." Given adequate facilities for psychological diagnosis and treatment, "the true line of progress lies, I would suggest, not in acquitting large numbers on the ground of irresponsibility, but in adequate investigations after conviction"; if this were done, "the prolonged battle between psychologists and lawyers that would be necessary before the Rules were widened would become no more important than the battle between Tweedledum and Tweedledee" (pp. 33–4, 158). This, it is submitted, seems to be somewhat too visionary to be acceptable for the time being. Granted that there have been too many futile battles of this kind in the past and that there are bound to be too many in the future, how can this be avoided unless the whole body of criminal law and procedure be transferred *en bloc* to the administrative branch of the law? To a large extent, for reasons which cannot be discussed here, such a transfer is likely to become necessary sooner or later, and when it happens it will, among other things, mean the disappearance of the stigma still attached to a criminal conviction. It is just this stigma that makes, at present, all the difference in the world between a verdict of "guilty" and one of "guilty but insane," and as long as it exists a reform of the McNaughten Rules would appear to be desirable even if no other practical advantages could be expected from it.[1]

There are, however, many other suggestions in the book on the reform of constitution and procedure of criminal courts which seem to deserve the closest attention. The author's criticism of the Jury system, of provincial Assizes and Quarter Sessions, and his insistence on better criminological and psychological training of judges and magistrates may be mentioned. It cannot be too often repeated that the only possible alternative to such training is the American solution of a Treatment Tribunal. That the author disapproves of such a radical step is only natural; the present reviewer, however, whom he correctly ranges among the opponents of the Tribunal has now, regretfully, come to the conclusion that the arguments in its favour are overwhelming.

Reasons of space forbid to mention more than a few of the author's admirable suggestions for a reform of criminal procedure. Investigations into the offender's personal circumstances to be made compulsory in adult courts as they already are in juvenile courts. To relax the strict rules of cross-examination and of the reading of documents in open courts on the lines of the Juvenile Court Rules of 1933. Sexual offences against children to be dealt with in juvenile courts, in serious cases with a High Court judge as chairman. As far as juvenile offenders are concerned, the present reviewer is particularly glad to read that "it might perhaps have been better to remove the delinquencies of those who are regarded by the law as children from criminal procedure completely" (p. 182), though he is not in favour of the idea that young persons between 14 and 17 "might have been dealt with by the ordinary magistrates' courts, but under a different and separate procedure."

Every reader of the present book will eagerly look forward to the publication of the author's next work, *Why Crime?* which will give a survey of the causal factors in crime.

HERMANN MANNHEIM.

[1] On the need for reform see now the admirable paper "A Century of the McNaughten Rules," by Mr. Henry Barnes, *Cambridge Law Journal*, 1944, p. 300.

LIMITATION OF ACTIONS. By the late C. H. S. PRESTON and G. H. NEWSOM. Second Edition by G. H. NEWSOM. The Solicitors' Law Stationery Society, Ltd., 1943. pp. xlviii and 318.

The first edition of this work appeared in March, 1940. That after less than three years a second edition has become necessary, is convincing proof of its value for both branches of the profession. Since, unfortunately, Mr. Preston lost his life at Dunkirk, it fell to Mr. Newsom alone to revise and, in parts, to re-write a book which, as appears from the preface, originally was a joint work in the fullest sense of the word. The present editor has discharged his task with great care and ability, and such revisions as he has made constitute real improvements. The important decision of the Court of Appeal in *Re Bowring—Hanbury* (1943), 1 All E.R. 48, was rendered only while the book was in the press. In the Court of first instance Bennett, J., decided that the operation of the statute was not suspended by reason of the fact that the creditor had become the debtor's executor. The decision in *Seagram* v. *Knight* (1867), L.R. 2 Ch. 628, was not cited to him, but it was relied upon in the Court of Appeal which held that it only applied where the debtor becomes the administrator of the creditor's estate. This is in accordance with the views expressed by Mr. Newsom. In a note on the effect of War upon the Limitation Act (a question also dealt with in a learned contribution to the *Tulane Law Review* of February, 1943), the editor maintains that the running of time is not interrupted by the fact that the plaintiff becomes an enemy. He feels unable to accept Sir A. D. McNair's opinion to the opposite effect. It cannot be gainsaid that Mr. Newsom's reasoning, though based on somewhat narrow grounds, is forceful and likely to find favour with judicial minds. Although the problem is not connected with the Limitation Act, 1939, a note on the effect of war might in future editions usefully include observations on the practice of the Prize Court.

The author confesses that he is conscious of the fact that there remains substantial room for improvement in respect of which he asks for indulgence. This reveals exaggerated modesty. No book will universally be regarded as perfect, but this work comes very near practical perfection.

F. A. MANN.

THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION. By ERNST H. FEILCHENFELD. Washington, Carnegie Endowment for International Peace, 1942. Pp. XII and 181. **$1.50.**

This book is devoted to a branch of the law which is of great and immediate importance. It has received little attention for many years, and when war broke out in 1939 and Germany embarked upon the invasion of so many European countries and a ruthless policy of spoliation, there arose an urgent need for a comprehensive treatment of the legal aspects of belligerent occupation. This up-to-date work goes a long way to fill a gap which, without it, might have become troublesome.

The book contains not only commentaries on Section III of the Hague Regulations Respecting the Laws and Customs of War on Land, 1907, which deals with "Military Authority over the Territory of the Hostile State," but also discusses many matters with which these Regulations do not expressly deal. It is divided into six chapters: General Observations; Treatment of Property; Public Finance; Regulation and Organization; Occupation during an Armistice; Relations between Jurisdictions. The

author explains that he had to write the book "within the limited time available to him," and he is conscious of the fact that he has been unable to "achieve peace-time academic standards in a new research." While it is true that the documentation is not so complete and reliable and the presentation is not always so clear and concise as could have been expected in more leisured times, no lawyer, whether he is theoretically interested in or practically concerned with the subject, will be able to dispense with Dr. Feilchenfeld's guidance.

The Hague Regulations expose in a particularly striking manner the problematical character of international law. On the one hand they formulate such universally accepted rules of international law as are binding upon, and enforced by, municipal tribunals, and it is in this connection that their practical significance is greatest. It would indeed have been desirable if Dr. Feilchenfeld had paid still closer attention to the type of problem with which municipal courts will be faced, particularly in neutral countries, and to the solutions which they should adopt.

On the other hand, in so far as the Regulations represent international law binding the belligerent states, they are characterised by the fact that they have been and are being freely disregarded. Such breaches of international duties will not always be open to condemnation. Dr. Feilchenfeld asks the pertinent question (p. 24), "Should an occupant, for instance, be forced to respect in an invaded fascist region both racial discrimination and the suppression of free speech?" "In view of the special emphasis of this study on economic problems," Dr. Feilchenfeld feels that he is not required to give an answer (p. 89). Although to a very large extent his work is of a descriptive character, it would be wrong to think that he is not fully aware of the fundamental problems involved in the Regulations. In his "General Observations" he sets forth with courage and perspicuity a great many truths which have to be faced. Dr. Feilchenfeld does not seem to believe in the positivism which animated the authors of the Regulations, and is conscious of the futility of applying positivism to the subject with which they deal. Yet he has chosen to write on this subject. He must have done so with mixed feelings. It is due not to the author but to the subject that the reader, too, leaves the book with feelings which are equally mixed. F. A. MANN.

WAR DAMAGE GUIDE. By JOHN BURKE. Sweet & Maxwell, Ltd., 1943. pp. x and 148. Price **10s. 6d.**

This is a very useful little book. It gives a succinct summary of the War Damage Act, 1943, and other legislation relating to war damage, and reproduces practice notes issued by the War Damage Commission. The practitioner on whom this type of legislation often imposes great burdens will welcome a guide which provides rapid and reliable instruction while not purporting to contain elaborate commentaries. F. A. MANN.

PUBLICATIONS RECEIVED

GOVERNMENT DIGEST, VOL. 1, NO. 1 (May 1, 1944). Published by the Chamber of Commerce of the United States, Washington, 6, D.C.

SYMPOSIUM IN HONOUR OF THE 60TH BIRTHDAY OF DR. EDUARD BENES. Edited by DR. EGON SCHWELB, and published in Czech by the Association of Czechoslovak Advocates Abroad, 43–4 Warrington Crescent, London, W.9. 111 pp. **4s.**